Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-100–12 OF 2014(S)
RAUS SHARIF CHIEF JUSTICE, AHMAD MAAROP CJ (MALAYA), HASAN LAH, ABU SAMAH NORDIN AND AZIAH ALI FCJJ
26 SEPTEMBER 2017

Tort — Defamation — Libel — Publication of defamatory statements in two news articles — Whether words in news articles defamatory of plaintiff — Whether defendants responsible for publication of news articles — Defences — Reynolds privilege — Responsible journalism — Whether defence applied — Whether words uttered on a matter of public interest — Whether defendants acted reasonably in publishing impugned words — Whether first defendant taken steps to verify impugned statements — Damages — Quantum of — Whether seriousness of libel and recklessness in its publication relevant factors in determining quantum

At all material times, both the plaintiff and the first defendant were the former Chief Ministers of Sabah. In a speech, which was later published in the *Daily Express* on 4 April 2010, Tengku Razaleigh Hamzah ('Tengku Razaleigh') had referred to an air crash in Kota Kinabalu that took place in 1976, which had killed all on board including the newly appointed Chief Minister, the late Tun Fuad Stephens ('Tun Fuad'), and more than half of the cabinet ministers ('the double six tragedy'). After the passing of Tun Fuad Stephens, the plaintiff, who was then the Deputy Chief Minister of Sabah, took over as the Chief Minister, the post of which he held on until his Berjaya Party was defeated in the 1985 election. The first defendant, who was the head of the second defendant political party, seized onto the speech by Tengku Razaleigh and caused to be published a news article that called for a reinvestigation of the air crash incident. Two days after the publication of this news article, the plaintiff, issued a press statement of his own disputing the accuracy of accounts given by Tengku Razaleigh and giving his own version of events that led up to the air crash incident. The plaintiff also challenged the defendants to repeat their remarks more specifically and openly. The first defendant accepted this challenge by causing to be published a second statement in the same newspaper. In this second statement, the first defendant again called for a reinvestigation into the air crash in the light of certain new information that had surfaced. The plaintiff commenced an action in defamation against the defendants. It was the plaintiff's contention that the statements in the two

articles published by the defendants could be understood to mean that he should be investigated because he had conspired with others to, inter alia, assassinate the late Tun Fuad so as to become the Chief Minister of Sabah. The plaintiff claimed damages of not less than RM50m for the character assassination by the defendants. The defendants submitted that the call for reinvestigation into the air crash was made in the light of the new evidence that had come to light through the speech by Tengku Razaleigh and that there had been no defamation of the plaintiff. Alternatively, the defendants relied on the defences of qualified privilege and fair comment. The High Court judge found that although the two statements looked innocent and harmless on the surface, when read between the lines, and in the context of the speech by Tengku Razaleigh, the first defendant's call for reinvestigation was in pith and substance a call to investigate the plaintiff for a possible involvement in a criminal act. The trial judge also ruled against the defendants in respect of the defence of qualified privilege and fair comment, which resulted in the defendants being found liable to the plaintiff. In the circumstances of the case, it was the considered view of the High Court that a global sum of RM1m for compensatory, aggravated and exemplary damages was fair and reasonable. The defendants appealed to the Court of Appeal. The Court of Appeal accepted the correctness of the High Court's ruling that the statements were defamatory and that the defence of justification did not avail the defendants. However, the Court of Appeal allowed the defendants' appeal because it found that the defence of qualified privilege had neither been properly considered nor properly applied by the trial judge to the facts of this case. The Court of Appeal also held that the award was excessive and reduced it to RM100,000. Hence the present appeal wherein the plaintiff contended that the Court of Appeal had erred in law and in fact in allowing the defendants' appeal based on the *Reynolds* privilege. The plaintiff submitted that in order to invoke that defence, the first defendant should have satisfied the court that he had fulfilled the element of responsible journalism by taking reasonable steps to verify the accuracy of the new information and/or the impugned statements, which he had failed to do.

Held, allowing the appeal with costs:

(1) The *Reynolds* privilege defence, which was predicated on public interest and 'responsible journalism' required the defendants to establish that the impugned words were uttered on a matter of public interest and the public had a corresponding interest in receiving the same. Once that was established, the defendants had to prove that they acted reasonably in publishing the impugned words. It was the High Court judge's finding that Tengku Razaleigh's speech had not called for a reinvestigation of the air crash or suggested that the plaintiff was an accessory to a criminal act. The trial judge also held that what the first defendant did was to give his own slant to Tengku Razaleigh's revelation in order to cast aspersion on the plaintiff. The Court of Appeal, on the other hand, held that if the

article as a whole was justified, then, the defence of qualified privilege was available to the first defendant even if the article was defamatory and some facts untrue. It was clear that the impugned statements in the present appeal concerned a matter of public interest, namely the double six tragedy, which took the lives of all on board the plane including Tun Fuad Stephens and some of the Cabinet Ministers and also Tengku Razaleigh's speech following the tragedy. However, even after giving maximum latitude to editorial judgment, it was unnecessary to embellish and spice up what Tengku Razaleigh had revealed in his speech with insinuation of the plaintiff's possible complicity in the commission of a criminal act. The first defendant had in effect gone beyond what Tengku Razaleigh had mentioned in his speech, and speculated, and embellished Tengku Razaleigh's speech with insinuation of the plaintiff's possible complicity in the criminal act of multiple murders. In the circumstances it was difficult to agree with the findings of the Court of Appeal on the first defendant availing himself of this defence (see paras 47–50).

(2) One of the relevant elements in the determination of responsible journalism was the duty of verification. In this regard, the thrust of the defendants' contention that the first defendant had made all the checks that were necessary to justify his call for an inquiry, was unacceptable. There was no merit in this contention. In the present appeal, Tengku Razaleigh's account of how he and two others left the aircraft at the very last moment before its take off, was the essence of the new revelation which was of paramount importance to the impugned statements and their publication by the defendants. If in the impugned statements the defendants had merely reported what Tengku Razaleigh had said in the speech, the plaintiff would not have cause to complain. However, as it transpired that was not the case. It was clear that not only did the first defendant adopt and embrace what Tengku Razaleigh had said in his speech, but he had embellished it with speculation and insinuation of the plaintiff's possible involvement in the assassination of Tun Fuad Stephens and those on board the ill-fated flight. In such a case, it was not sufficient for the first defendant to just establish that he had verified that the statement was made. The first defendant should instead satisfy himself that Tengku Razaleigh's speech as well as the insinuation made in the impugned statements he published were true, and his belief in its truth should be the result of a reasonable investigation and that the belief ought to be a reasonable belief to hold; all of which the first defendant had failed to do. Further, based on the evidence it was clear that the first defendant had not verified with Tengku Razaleigh personally the truth and accuracy of his account, and Tengku Razaleigh himself had not testified at the trial to establish the truth and accuracy of his account; and without Tengku Razaleigh's testimony the defendants had failed to establish the truth and accuracy of Tengku Razaleigh's account. As such the defendants had

failed the responsible journalism test and failed to establish the *Reynolds* privilege defence. In the circumstances, the Court of Appeal erred in finding the issue of liability in favour of the defendants and setting aside the decision of the High Court (see paras 53–58, 63–65 & 68–69).

(3) The tort of defamation exists to protect, not the person or the pocket, but reputation of the person defamed. In the present appeal, the learned trial judge was correct in having considered the seriousness of the libel, the extent of the publication, the plaintiff's reputation and the adverse effect of the defamatory statements on his dignity and reputation, and the conduct of the defendants including absence of remorse for defaming the plaintiff. In the circumstances of this case, a total award of RM600,000 would be reasonable. Therefore, the plaintiff's appeal on damages should be allowed, with the total damages awarded to the plaintiff increased to RM600,000 (see paras 76 & 82–83).

[Bahasa Malaysia summary

Pada kesemua masa material, kedua-dua plaintif dan defendan pertama adalah mantan Ketua Menteri Sabah. Dalam ucapan, yang kemudiannya diterbitkan di dalam *Daily Express* pada 4 April 2010, Tengku Razaleigh Hamzah ('Tengku Razaleigh') telah merujuk kepada kemalangan udara di Kota Kinabalu yang berlaku pada tahun 1976, yang telah membunuh kesemua orang yang berada di atas kapal terbang termasuk Ketua Menteri yang baru dilantik, arwah Tun Fuad Stephens ('Tun Fuad'), dan lebih daripada sebahagian Menteri-Menteri Kabinet (tragedi 'double six'). Selepas kematian Tun Fuad Stephens, plaintif, yang pada ketika itu Timbalan Ketua Menteri Sabah, mengambil alih sebagai Ketua Menteri, jawatan yang mana dipegangnya sehingga Parti Berjayanya kalah pada pilihan raya tahun 1985. Defendan pertama, yang mana adalah ketua parti politik defendan kedua, merampas ucapan oleh Tengku Razaleigh dan menyebabkan terbitan artikel berita yang memohon bagi penyiasatan semula kejadian kemalangan udara tersebut. Dua hari selepas penerbitan artikel berita ini, plaintif, mengeluarkan kenyataan akhbarnya mempertikaikan ketepatan keterangan yang diberikan oleh Tengku Razaleigh dan memberi versinya sendiri terhadap kejadian yang membawa kepada kejadian kemalangan udara tersebut. Plaintif juga mencabar defendan-defendan untuk mengulang kata-kata mereka secara lebih khusus dan terbuka. Defendan pertama menerima cabaran ini dengan menyebabkan pernyataaan kedua diterbitkan dalam surat khabar yang sama. Dalam pernyataan kedua, defendan pertama juga memohon untuk penyiasatan semula kemalangan udara tersebut berdasarkan maklumat baru tertentu yang telah timbul. Plaintif memulakan tindakan fitnah terhadap defendan-defendan. Ia adalah hujahan plaintif bahawa pernyataan-pernyataan di dalam kedua-dua artikel yang diterbitkan oleh defendan-defendan boleh difahami untuk bermaksud bahawa dia patut disiasat kerana dia telah bersekongkol dengan yang lain untuk, antara lain, membunuh arwah Tun

A Fuad untuk menjadi Ketua Menteri Sabah. Plaintif menuntut ganti rugi tidak kurang daripada RM50 juta bagi pembunuhan watak oleh defendan-defendan. Defendan-defendan berhujah bahawa permohonan untuk penyiasatan semula kemalangan udara tersebut dibuat berdasarkan keterangan baru yang telah timbul melalui ucapan oleh Tengku Razaleigh dan
B tidak terdapat fitnah terhadap plaintif. Secara alternatif, defendan-defendan bergantung ke atas pembelaan pelindungan bersyarat dan komen adil. Hakim Mahkamah Tinggi mendapati bahawa walaupun kedua-dua pernyataan pada zahirnya nampak tidak bersalah dan tidak berbahaya, apabila membacanya maksud yang tersirat, dan mengikut konteks ucapan oleh Tengku Razaleigh,
C permohonan defendan pertama untuk penyiasatan semula adalah sifat dan bahagian paling penting permohonan untuk menyiasat plaintif bagi kemungkinan penglibatan dalam tindakan jenayah. Hakim perbicaraan juga memutuskan terhadap defendan-defendan berkaitan pembelaan pelindungan
D bersyarat dan komen adil, yang mengakibatkan defendan-defendan didapati bersalah terhadap plaintif. Dalam keadaan kes, ia adalah pandangan yang dipertimbangkan Mahkamah Tinggi bahawa jumlah global sebanyak RM1 juta bagi pampasan, ganti rugi tambahan dan teladan adalah adil dan munasabah. Defendan-defendan merayu kepada Mahkamah Rayuan.
E Mahkamah Rayuan menerima pembetulan keputusan Mahkamah Tinggi bahawa pernyataan tersebut adalah fitnah dan bahawa pembelaan justifikasi tidak diberikan kepada defendan-defendan. Walau bagaimanapun, Mahkamah Rayuan membenarkan rayuan defendan-defendan kerana ia
F mendapati bahawa pembelaan pelindungan bersyarat tidak pernah dipertimbangkan dengan betul atau diguna pakai secara betul oleh hakim perbicaraan kepada fakta kes ini. Mahkamah Rayuan juga memutuskan bahawa award adalah berlebihan dan mengurangkannya kepada RM100,000. Maka, rayuan ini di mana plaintif berhujah bahawa Mahkamah Rayuan telah
G tersilap dari segi undang-undang dan fakta dalam membenarkan rayuan defendan-defendan berdasarkan pelindungan *Reynolds*. Plaintif berhujah bahawa untuk membangkitkan pembelaan tersebut, defendan pertama patut memuaskan mahkamah bahawa dia telah memenuhi elemen tanggungjawab kewartawanan dengan mengambil langkah munasabah untuk mengesahkan ketepatan maklumat baru dan/atau pernyataan yang dipersoalkan tersebut,
H yang mana dia gagal berbuat sedemikian.

Diputuskan, membenarkan rayuan plaintif dengan kos:

(1) Pembelaan pelindungan *Reynolds*, yang mana didasarkan ke atas kepentingan awam dan 'responsible journalism' memerlukan
I defendan-defendan untuk membuktikan bahawa perkataan-perkataan yang dipersoalkan dikatakan atas perkara kepentingan awam dan orang awam mempunyai kepentingan sepadan dalam menerima yang sama. Apabila ia dibuktikan, defendan-defendan perlu membuktikan bahawa mereka bertindak secara munasabah dalam menerbitkan

perkataan-perkataan yang dipersoalkan tersebut. Ia adalah dapatan hakim Mahkamah Tinggi bahawa ucapan Tengku Razaleigh tidak memohon untuk penyiasatan semula kemalangan udara tersebut atau mencadangkan bahawa plaintif adalah aksesori kepada tindakan jenayah. Hakim perbicaraan juga memutuskan bahawa apa yang defendan pertama lakukan adalah untuk memberi sudutnya sendiri kepada pendedahan Tengku Razaleigh untuk melemparkan fitnah ke atas plaintif. Mahkamah Rayuan, sebaliknya, memutuskan bahawa jika artikel secara keseluruhannya berjustifikasi, dengan itu, pembelaan pelindungan bersyarat boleh digunakan oleh defendan pertama walaupun artikel itu adalah fitnah dan sebahagian fakta adalah tidak betul. Ia adalah jelas bahawa pernyataan-pernyataan yang dipersoalkan di dalam rayuan ini berkenaan perkara kepentingan awam, terutamanya tragedi 'double six' yang telah mengambil nyawa kesemua yang berada di atas kapal terbang termasuk Tun Fuad Stephens dan sebahagian Menteri-Menteri Kabinet dan juga ucapan Tengku Razaleigh berikutan tragedi tersebut. Walau bagaimanapun setelah memberi latitud maksimum kepada penghakiman editorial, adalah tidak perlu untuk memberi huraian dengan lanjut dan memperbesarkan apa yang telah didedahkan oleh Tengku Razaleigh di dalam ucapannya dengan sindiran persubahatan kemungkinan plaintif dalam melakukan tindakan jenayah. Defendan pertama telah sebenarnya melampaui apa yang Tengku Razaleigh sebut di dalam ucapannya, dan membuat spekulasi dan menghuraikan dengan lebih lanjut ucapan Tengku Razaleigh dengan sindiran persubahatan kemungkinan plaintif dalam tindakan jenayah pelbagai pembunuhan. Dalam keadaan, ia adalah sukar untuk bersetuju dengan dapatan Mahkamah Rayuan ke atas defendan pertama untuk defendan pertama mendapatkan pembelaan ini (lihat perenggan 47–50).

(2) Salah satu elemen yang relevan dalam penentuan tanggungjawab kewartawanan adalah tugas pengesahan. Dalam perkara ini, teras hujahan defendan-defendan bahawa defendan pertama telah membuat kesemua siasatan yang perlu untuk menjustifikasi permohonannya bagi siasatan, adalah tidak boleh diterima. Tidak terdapat merit dalam hujahan ini. Dalam rayuan ini, keterangan Tengku Razaleigh bagaimana dia dan dua yang lain meninggalkan kapal terbang pada saat-saat akhir sebelum ia berlepas, adalah inti pati pendedahan baru yang mana adalah penting kepada pernyataan-pernyataan yang dipersoalkan dan penerbitannya oleh defendan-defendan. Jika dalam pernyataan-pernyataan yang dipersoalkan defendan-defendan hanya melaporkan apa Tengku Razaleigh telah katakan di dalam ucapan, plaintif tidak akan mempunyai kausa untuk mengadu. Walau bagaimanapun, seperti yang berlaku ia bukan seperti itu. Ia adalah jelas bahawa bukan sahaja defendan pertama mengguna pakai dan menerima apa Tengku Razaleigh katakan di dalam ucapannya, tetapi dia telah

menghuraikan dengan lebih lanjut dengan membuat spekulasi dan sindiran terhadap kemungkinan penglibatan plaintif pembunuhan Tun Fuad Stephens dan mereka di dalam penerbangan yang malang tersebut. Dalam keadaan sedemikian, adalah tidak mencukupi untuk defendan pertama hanya membuktikan bahawa dia telah mengesahkan bahawa pernyataan tersebut dibuat. Defendan pertama sepatutnya memuaskan hatinya bahawa ucapan Tengku Razaleigh dan juga sindiran yang dibuat di dalam pernyataan-pernyataan yang dipersoalkan yang dia terbitkan adalah benar, dan kepercayaannya dalam kebenarannya patut menjadi hasil penyiasatan munasabah dan bahawa kepercayaan tersebut sepatutnya adalah untuk memegang kepercayaan munasabah; yang mana kesemuanya defendan pertama gagal untuk melakukannya. Selanjutnya, berdasarkan keterangan ia adalah jelas bahawa defendan pertama tidak mengesahkan dengan Tengku Razaleigh secara peribadi kebenaran dan ketepatan keterangannya, dan Tengku Razaleigh sendiri tidak memberi keterangan semasa perbicaraan untuk membuktikan kebenaran dan ketepatan keterangannya; dan tanpa keterangan Tengku Razaleigh defendan-defendan telah gagal untuk membuktikan kebenaran dan ketepatan keterangan Tengku Razaleigh. Dengan itu defendan-defendan telah gagal ujian tanggungjawab kewartawanan dan gagal untuk membuktikan pembelaan pelindungan *Reynolds*. Dalam keadaan, Mahkamah Rayuan tersilap dalam mendapati isu liabiliti memihak defendan-defendan dan mengenepikan keputusan Mahkamah Tinggi (lihat perenggan 53–58, 63–65 & 68–69).

(3) Tort fitnah wujud untuk melindungi, bukan orang atau poket, tetapi reputasi orang yag difitnahkan. Dalam rayuan ini, hakim perbicaraan yang bijaksana adalah betul dalam mempertimbangkan keseriusan fitnah bertulis, sejauh mana penerbitan, reputasi plaintif dan kesan bertentangan pernyataan fitnah ke atas maruah dan reputasinya, dan tingkah laku defendan-defendan termasuk ketiadaan penyesalan kerana memfitnah plaintif. Dalam keadaan kes, jumlah keseluruhan award sebanyak RM600,000 adalah munasabah. Oleh itu rayuan plaintif ke atas ganti rugi patut dibenarkan, dengan keseluruhan ganti rugi diawardkan kepada plaintif ditambahkan kepada RM600,000 (lihat perenggan 76 & 82–83).]

Notes

For cases on libel, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 597–835.

Cases referred to

Adam v Ward [1916–17] All ER Rep 157; [1917] AC 309, HL (refd)

Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005] 2 CLJ 569, CA (refd)

Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris [2014] 9 MLJ 605; [2015] 2 CLJ 557, HC (refd)
Flood v Times Newspapers Ltd [2012] 2 AC 273, SC (refd)
Galloway v Telegraph Group Ltd [2006] All ER (D) 178 (Jan); [2006] EMLR 221, CA (refd)
Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2012] 4 MLJ 191, CA (refd)
Horrocks v Lowe [1974] 1 All ER 662, HL (refd)
Jameel and another v Wall Street Journal Europe SPRL [2006] 4 All ER 1279; [2007] 1 AC 359, HL (refd)
Karpal Singh a/l Ram Singh v DP Vijandran [2001] 4 MLJ 161, CA (refd)
Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors [2001] 2 CLJ 385, CA (refd)
MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals [1995] 2 MLJ 493; [1995] 2 CLJ 912, CA (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337, FC (folld)
Pinard-Byrne v Linton [2015] UKPC 41, PC (refd)
Reynolds v Times Newspapers Ltd and others [1999] 4 All ER 609, HL (folld)
Roberts and another v Gable and others [2007] EWCA Civ 721, CA (refd)
Seaga v Harper [2008] 1 All ER 965, PC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee [2015] 6 MLJ 187; [2015] 8 CLJ 477, FC (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)
Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2) [1986] 2 MLJ 420 (refd)

Appeal from: Civil Appeal No S-02–691–03 of 2012 (Court of Appeal, Putrajaya)

Yunof E Maringking (Trevor Kenneth Maringking and Latania John Masabal with him) (Maringking & Co) for the appellant.
Geoffrey Robertson QC (Simon Shim ESQ with him) (Shim Pang & Co) for the respondents.

Ahmad Maarop CJ (Malaya):

[1] In this judgment the parties will be referred to as they were in the proceeding in the High Court.

[2] This case concerns the plaintiff's appeal against the decision of the Court of Appeal on 18 November 2013 reversing the decision of the High Court which had, on 29 February 2012 allowed the plaintiff's claim for libel against the defendants, and awarded the plaintiff a global sum of RM1m for

compensatory, aggrieved and exemplary damages.

[3] The leave to appeal to this court was granted on the following question:

> Whether the defence of qualified privilege can be invoked by the first respondent against any person who relied on information which truthfulness or accuracy is doubted and/or which is already known to the public.

[4] The background facts leading to the present appeal are these. Both the plaintiff and the first defendant are the former Chief Ministers of Sabah. The second defendant is a political party. The suit which is the subject matter of this appeal was triggered by a speech delivered by Tengku Razaleigh Hamzah ('Tengku Razaleigh') at the Hongkod Koisan KDCA Penampang, Sabah on 2 April 2010. The speech was published in the *Daily Express* on 4 April 2010 with the caption 'Invite saved my life: Razaleigh'. The topic of the speech was 'Minyak Sabah Untuk Siapa?'. The relevant parts of the speech are as follows:

> Apabila cakap hal minyak dan Sabah, tak dapat tiada saya mesti mengingat kembali peristiwa yang amat sedih yang berlaku di sini yang menimpa rakyat Sabah dan negeri Sabah terutama sekali. Saya ingat dalam bulan Jun tahun 76, satu kemalangan besar berlaku di Sabah. Umur saya panjang, orang kenalan saya yang saya sanjung tinggi umurnya pendek. Allahyarham Yang Amat Berhormat Tun Fuad Stephens dan anaknya sekali dengan pemimpin-pemimpin yang lain dari negeri Sabah dan juga pegawai-pegawai dari negeri Sabah dan dari kerajaan pusat bersekali dengan setiausaha sulit saya telah menjadi mangsa nahas apabila jatuhnya kapal terbang yang dinaiki mereka. Saya sendiri sudahpun menaiki pesawat berkenaan bersekali dengan Tun Rahman Yaakob dan bersama-sama dengan saya melawat Labuan dan juga Sabah ketika itu dan dengan Almarhum Tengku Arif Bendahara Pahang. Kita semua sudah 'strapped' dah pakai tali pinggang kapalterbang. Saya duduk di belakang Allahyarham Tun Fuad Stephens, sebelah kanan saya Tun Rahman Yaakob, sebelah belakang saya Tengku Arif Bendahara Pahang. Tiba-tiba Datuk Harris yang pada masa itu menjadi Timbalan Ketua Menteri Sabah mengajak saya keluar dari kapalterbang, kerana dia kata elok kita ke Pulau Banggi melihat rancangan belaan sapi dari Australia di Pulau Banggi. Saya pun ajak Tun Rahman Yaakob dan Tengku Arif Bendahara bersama dengan saya turun kerana saya kata elok juga kita ikut Datuk Harris ke Pulau Banggi kerana saya nak tengok rancangan bela sapi, kita panggil lembu, di Pulau Banggi. Jadi kita pun ikut Datuk Harris ikut kapal terbang jenis yang sama Nomad, kita pergi ke Pulau Banggi.

[5] In this regard, it is common ground that the first defendant made two statements on 4 April 2010 and 9 April 2010 respectively ('the impugned statements') in the context of the revelation by Tengku Razaleigh that minutes before the Nomad aircraft was due to take off from the Labuan airport, and when he was already strapped to his seat, the plaintiff came over and invited him to visit Pulau Banggi, Kudat to see a cattle farm project. The aircraft later crashed near Sembulan, Kota Kinabalu, killing all on board including the

newly appointed Chief Minister, the late Tun Fuad Stephens and more than half of the Berjaya Cabinet Ministers. As the tragedy occurred on 6 June 1976, some call it double six tragedy and some others call it triple six tragedy. In the trial in the High Court and in the judgment of High Court, the learned trial judge referred to it as the double six tragedy. After the passing of Tun Fuad Stephens, the plaintiff, who was then the Deputy Chief Minister of Sabah, took over as the Chief Minister, the post of which he held on until his Berjaya Party was defeated in the Sabah State Election in 1985.

[6] Latching on to the speech by Tengku Razaleigh, the first defendant issued a statement on 4 April 2010 which was published in the *Daily Express* on 5 April 2010 under the caption 'SAPP WANTS FILE ON TRIPLE SIX TRAGEDY PROBE REOPENED' ('the first statement'). The statement reads:

> The opposition Sabah Progressive Party (SAPP) has called for the investigation file on the June 6, 1976 Nomad air crash that claimed the lives of leading Sabah politicians including newly-elected Chief Minister Tun Fuad Stephens to be re-opened to remove all doubts about the true causes.
>
> Its President Datuk Yong Teck Lee said Tengku Razaleigh Hamzah's first hand account of how he left the ill-fated aircraft at the very last moment that saved his life also opens up old speculation of how the plane crashed in Sembulan.
>
> How we remember the past shapes how we look at today's Sabah. It is for this reason that SAPP repeats our call for the lifting of the ban on the book 'Golden Son of the Kadazan' about a prominent victim in the crash, Datuk Peter Mojuntin.
>
> It is also time to reopen the investigation in the June 6, 1976 air crash so that all doubt about the true causes of the crash are removed.
>
> Prior to Razaleigh's revelation he said the people in Sabah had relied on word of mouth and other indirect sources. He said the 1976 book 'The Politics of Federalism, Syed Kechik in East Malaysia' had described Razaleigh as the 'point man' in engineering and funding the defeat of Usno Alliance by Party Berjaya in 1976.
>
> Syed Kechik (now deceased) had, in the book, said that the late Tun Mustapha felt that future generations of Sabahans might later criticize his surrender of the State's wealth to the Federal Government, and he wanted the clause 'in perpetuity' be removed from the petroleum agreement.
>
> Now that this fact has been reliably corroborated by a surviving, credible leader (Razaleigh) of the time, Sabahans will gain a better understanding of the political and economic relationship between Sabah and the Federal Government, he said.

[7] On 7 April 2010, the plaintiff issued a press statement of his own disputing the accuracy of the accounts given by Tengku Razaleigh, and challenged the defendants to repeat their remarks and accusation more specifically and openly. The first defendant accepted the challenge by causing

to be published in the same newspaper a second statement captioned 'BASIS TO REOPEN DUE TO NEW INFO: YONG' dated 9 April 2010 ('the second statement'). The statement reads:

> Sabah Progressive Party (SAPP) President Datuk Yong Teck Lee said it is to be expected that the people will want to re-examine the June 6, 1976 air crash in light of Tengku Razaleigh Hamzah's memory of the tragedy.
>
> Responding to former Chief Minister Datuk Harris Salleh's response to his call to re-open the investigation, Yong said Razaleigh was trying to tell the people something from the past in view of his revelation on the moment before the Nomad aircraft took off from Labuan.
>
> Normally, it is proper to re-open an investigation into an old incident if new information surface. In this case, the new information is Razaleigh's version of event that has been put on public record for the first time.
>
> Maybe nothing new will come out of the re-investigation. Or maybe something big and explosive will surface from the depths of history.
>
> Yong said historians and forensic scientists regularly re-examine past accidents, crime and unexplained incidents.
>
> Issues like the Kennedy, Martin Luther King and Benazir Bhutto assassinations and the Lady Diana death and many other cases are the subject of continuous study, he said.

[8] The plaintiff testified that he was embarrassed and distressed when the first defendant issued the second statement which to the plaintiff meant that the first defendant disbelieved his version of events. The plaintiff contended that the first statement and the second statement could be understood to mean that he must be investigated because he had conspired with others:

(a) to assassinate the late Tun Fuad Stephens who was then the Chief Minister of Sabah and other State Ministers and officials who were then travelling with him;

(b) to grab power and become the Chief Minister of Sabah himself after the demise of the late Tun Fuad Stephens;

(c) to replace the then Chief Minister by way of assassination of Tun Fuad Stephens;

(d) to facilitate the signing of a petroleum agreement between the Sabah State Government and the federal government; and

(e) to hand over the petroleum wealth of the State of Sabah to Petronas and/or the federal government.

The plaintiff claimed not less than RM50m for what he contended to be character assassination. The defendants on the other hand, contended that the

plaintiff was being ultra sensitive and that it was only a figment of his imagination that the call for reinvestigation was defamatory of him.

[9] The High Court found that the statements referred to the plaintiff. The High Court also found that the first defendant caused the statements to be published. This is what it said:

> *Whether the defendants responsible for publication (third issue)*
>
> It is the defendants' pleaded case that they were not responsible for the publication of the two statements. At the trial however the first defendant in no uncertain terms admitted that he knew or expected his press statements to be published by the press. His evidence in cross-examination is as follows:
>
> Q: Did you make a press conference or press release regarding your statement to call for re-investigation of the air crash incident on 6.6.1976?
>
> A: There was a press release issued on 4.4.2010 and I think another one day later.
>
> Q: Do you agree that at all material times you actually intended your statement to call for re-investigation on the air crash tragedy to be printed and published in the newspapers?
>
> A: Whenever we issue a press release, obviously we leave it to the newspapers whether to publish it without editing or censorship.

[10] The High Court also found that the statements were defamatory of the plaintiff. The learned trial judge found that on the surface, the two statements looked innocent and harmless — they merely call for a reinvestigation of the double tragedy. However, he found that 'the sting lay beneath the surface'. He held that read between the lines, and in the context of the speech by Tengku Razaleigh, the first defendant's call for reinvestigation was in pith and substance a call to investigate the plaintiff for a possible involvement in a criminal act. According to the learned trial judge, although there was nothing wrong for the first defendant to call for a reinvestigation of the double tragedy, when he insinuated that the plaintiff had blood in his hand without making any attempt to verify the truth of the alleged new information revealed by Tengku Razaleigh, the first defendant had crossed the line separating fair comment and malice aforethought. This is what the learned trial judge of the High Court said in his judgment:

> Are the two statements defamatory of the plaintiff? Do they have a tendency to lower him in the estimation of others? On the surface the statements look innocent and harmless. They merely call for a re-investigation of the double six tragedy. But the sting lies beneath the surface. Read between the lines and in the context of the speech by Tengku Razaleigh the first defendant's call for re-investigation was in pith and substance a call to investigate the plaintiff for a possible involvement in a

criminal act. There is nothing wrong for the first defendant to call for a re-investigation of the double six tragedy but when he insinuated that the plaintiff had blood on his hand without making any attempt to verify the truth of the alleged new information revealed by Tengku Razaleigh, the first defendant had crossed the line separating fair comment and malice aforethought.

There is no mistaking the undercurrent, the undertone and the underpinning of the two statements. Each of them, in particular the second statement provoked speculation that the plaintiff knew in advance that something sinister was going to happen to the Nomad aircraft and that he had left the late Tun Fuad Stephens to die so that he could take over as Chief Minister of Sabah. The use of the words 'crime' and 'assassinations' albeit in reference to the assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto was calculated to give maximum impact to the insinuation of conspiracy to assassinate. An indirect accusation is as potent, if not more potent than a direct one.

The pleading itself reveals the defendants' real motive in calling for a re-investigation. By para 19(b) of the statement of defence the defendants expressly pleaded that the public want to know why the plaintiff did not board the same plane. It is not an innocent question. It is pregnant with insinuation that the plaintiff knew that the plane would crash and the reason why he did not board the plane was because he did not want to die.

Viewed objectively and applying the reasonableness test the statements are clearly defamatory of the plaintiff. A conspiracy to assassinate is a capital offence punishable with death under s 120B(1) of the Penal Code. The statements are therefore defamatory without proof of special damage: *Webb v Beavan* [1883] 11 QBD 609; *Hellwig v Mitchell* [1910] 1 KB 609; *Gray v Jones* [1939] 1 All ER 798.

Learned counsel for the defendants relied on the decision of the House of Lords in *Lewis v Daily Telegraph Ltd* [1962] 3 WLR 50 to press home the point that an ordinary man would not infer guilt merely from the first defendant's call for a re-investigation of the air crash. That is true but only if the first defendant, in calling for a re-investigation had not insinuated anything sinister against the plaintiff.

The first defendant in his testimony claimed that his comment on the incident was neutral because he used the words 'May be nothing new will come out of the re-investigation'. But the sentence that followed nullifies the neutrality of the words when he said 'or may be something big and explosive will surface from the depths of history' and then spicing it up by referring to the assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto. Thus, while the call for re-investigation was in itself perfectly neutral the insinuation that the plaintiff should be investigated for a possible criminal act took away whatever neutrality there was to the call for re-investigation.

A statement that is motivated by a desire to impute someone with a disgraceful act is prima facie defamatory.

[11] The defendants abandoned the defence of justification, and instead relied on the defence of qualified privilege and fair comment. The learned trial judge ruled against the defendants in respect of the defence of qualified

privilege and fair comment, resulting in their being found liable to the plaintiff. A

[12] The Court of Appeal accepted the correctness of the High Court's ruling that the statements were defamatory and that the defence of justification did not avail the defendants. However, the Court of Appeal allowed the defendants' appeal because it found that the defence of qualified privilege was not properly considered by the learned trial judge and that the law on the subject of qualified privilege was not properly applied by the learned trial judge to the facts of this case. B

C

[13] At the outset there is one preliminary point which must be dealt with in this appeal. In his memorandum of appeal, the plaintiff raised the following complaints:

(a) the learned judges of the Court of Appeal erred in law and in fact when Their Lordships ruled that the learned trial judge had incorrectly applied the law on the defence of qualified privilege to the facts of the case and/or that the defendants were not actuated by malice in making the defamatory statements despite the clear evidence and/or history of bad blood between the parties; and D

E

(b) the learned judges of the Court of Appeal failed to consider properly or at all whether the defence of qualified privilege can be invoked by the first defendant against any person who relied on information which truthfulness or accuracy is doubted and/or which is already known to the public.

F

[14] In his submission, referring to the complaints in the memorandum of appeal, learned counsel for the defendants submitted that this court had granted leave to appeal only on one question relating to the defence of qualified privilege. It was therefore contended that the plaintiff should be estopped from raising and arguing on the purported issue of malice before this court, as that issue was never allowed by this court in the application for leave. For the plaintiff, it was submitted that this court had the discretion to allow arguments or submission on the issue which was outside the scope of the question in respect of which leave to appeal was granted, in order to avoid miscarriage of justice. *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 was cited in support. We agree. In *Menteri Sumber Manusia*, dealing with similar point raised, this court ruled that: G

H

> ... the Federal Court has the power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice. I

[15] Indeed, the appellate panel is not prevented from granting leave to amend the question allowed by the leave panel or to even add in new question

in order to achieve the ends of justice (see *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25, per Zaki Azmi CJ at p 45).

THE PLAINTIFF'S SUBMISSION

[16] Learned counsel for the plaintiff submitted that the defence pleaded by the defendants was the conventional qualified privilege and not the *Reynolds* privilege, which was relied upon by the defendants in submission to escape the test of malice which, according to learned counsel for the plaintiff, was inherent within the scope of the conventional qualified privilege, and in this regard the evidence of malice against them was clear. According to learned counsel for the plaintiff, the defendants must not be allowed to depart from their pleaded defence. He contended that the Court of Appeal erred in law and in fact in allowing the defendants' appeal based on the *Reynolds* privilege. Alternatively, he submitted that if this court were to hold that the defendants could rely on the *Reynolds* defence, then he contended that the Court of Appeal had misdirected itself on the *Reynolds* privilege defence. To invoke that defence, the first defendant must satisfy the court that he had fulfilled the element of responsible journalism which, according to learned counsel, mean the defendants must satisfy the court that they had taken reasonable steps to verify the accuracy of the new information and/or the impugned statements. Elaborating on his submission, learned counsel for the plaintiff argued that the first defendant's call for reinvestigation of the incident based on the new information did not make any contribution to the public interest element. *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609, was cited in support. The first defendant did not verify with Tengku Razaleigh the truth of the new information. In fact the first defendant ignored the plaintiff's explanation. The first defendant even ignored his own knowledge on the background of the new information from the two books which he admitted as his reference books on the incident. It was contended that since the truth and accuracy of the new information was doubted, and that the serious allegations of criminal act were presented as statements of fact by the first defendant, but shorn of any mention about the plaintiff's explanation on the matter, the impugned statements were not information which the public had a right or ought to know. Moreover, according to learned counsel, the new information was reported widely in the local newspapers and was already public knowledge. The second statement was published by the first defendant after the plaintiff made a press statement disputing the new information. Despite this, the first defendant still did not seek verification with Tengku Razaleigh, which according to learned counsel, was unfair, unreasonable and was malicious. The first defendant knew that the accounts of events given by Tengku Razaleigh in his speech on 2 April 2010 was doubtful because it differed from his accounts as recorded in the two books, and which accounts the first defendant was aware as the two books were his reference books. This, learned counsel argued clearly

showed that the first defendant was not honest and/or had improper motive in publishing the impugned statements. A

[17] Learned counsel further submitted that there was a clear misdirection in the law on the part of the Court of Appeal when it said in para 16 of its judgment that the fact that the statements is in fact untrue and defamatory does not preclude the defence of qualified privilege from availing the defendants. B

[18] Responding to the submission made on behalf of the first defendant that he was entitled to invoke qualified privilege so long as he had acted responsibly in checking that Tengku Razaleigh actually made the statement revealing the new information and that the first defendant had no burden to investigate its accuracy, and that the truthfulness of Tengku Razaleigh's speech was a non-issue or irrelevant, learned counsel for the plaintiff submitted that the rationale of the said submission was that (as held by the Court of Appeal) the factual basis on the facts of this case was not whether the revelation of Tengku Razaleigh were true, but whether it was true that he made the revelations. Learned counsel submitted that the aforesaid submission was misconceived. He argued that if the first defendant could invoke the defence of qualified privilege without making verification on the truth of the statement by Tengku Razaleigh, rumour mongering will flourish, and reputation or dignity of human being will be without any protection in this country. C D E

[19] It was also submitted that in the context of the statement of claim and the statement of defence, the particulars of the qualified privilege stated under para 19(b) of the statement of defence constitute specific insinuation the truth of which the law requires the defendants to prove. Thus, the issue in this appeal is whether it was reasonable and prudent for the first defendant to repeat and rely on the new information without verification with Tengku Razaleigh, having regards to the first defendant's knowledge of the contents of the two books and the plaintiff's press statement on the event prior to the incident. It was submitted that the notion that the defendants could rely on the defence of qualified privilege just because the first defendant had purportedly acted responsibly by checking that Tengku Razaleigh had actually made the statement, but without verifying the truth of the new information directly with Tengku Razaleigh, is legally devoid of merit. F G H

[20] Elaborating on responsible journalism, learned counsel for the plaintiff submitted that the defendants had not acted responsibly in accordance with the ten factors listed by Lord Nicholls in his judgment in *Reynolds*. It was submitted that the first defendant cannot avail himself of the *Reynolds* defence of qualified privilege because not only had he failed to take responsible and fair I

steps to verify the impugned statements, all the other factors listed by Lord Nicholls were also against him.

[21] It was submitted that the Court of Appeal misdirected itself when it stated that the learned trial judge's ruling that the defendants' failure to verify with Tengku Razaleigh directly, the truth of the revelation he made was evidence of the first defendant's malice did not represent the law on qualified privilege. On the duty to verify, learned counsel cited para 80 in the judgment of Lord Phillips of Worth Matravers PSC in *Flood v Times Newspapers Ltd* [2012] 2 AC 273 at p 300:

> What did the duty of verification involve? There is authority at the level of the Court of Appeal that to justify a Chase Level 2 allegation a defendant has to adduce evidence of primary facts that constituted reasonable grounds for the suspicion alleged. These will normally relate to the conduct of the claimant. Allegations made by others cannot be relied upon.

[22] Learned counsel for the plaintiff also relied on the Privy Council case of *Pinard-Byrne v Linton* [2015] UKPC 41 where the court held at para 38, that there must be a public interest in the publication of the details of the allegation of crime or professional misconduct and there must be verification because the need for verification provides real protection for the individual concerned.

THE DEFENDANTS' SUBMISSION

[23] In his submission in reply learned counsel for the defendants submitted at length in support of his contention that the words in the impugned statements was not defamatory. Elaborating on this contention, learned counsel for the defendants submitted as follows:

(a) on 4 April 2010, the *Daily Express* reported, under the headline 'Invite saved my life: Razaleigh' a speech in which Tengku Razaleigh revealed for the first time that he was already strapped in his seat in the doomed plane, when the plaintiff invited him to inspect his cattle property. There was no dispute at trial, or on appeal, that this revelation had been made by Tengku Razaleigh and accurately reported by the *Daily Express*. The transcript of the speech of Tengku Razaleigh was agreed to be admitted as exhibit after the video chip containing Tengku Razaleigh's speech was played in open court at trial;

(b) on 5 April, under the heading 'Yong: Re-open investigation on the air crash of June 6, 1976' *The Express* reported the first defendant as saying that this revelation by Tengku Razaleigh:

> opens up old speculation of how the plane crashed in Sembulan. How we remember the past shapes how we look at Sabah ... It is also time to re-open

the investigation into the June 6 air crash so that all doubts about the true causes of the crash are removed.

(c) this was not a defamatory statement, and could not rationally be regarded as defamatory in any country which has a modicum of respect for free speech. It was simply a call to re-open an investigation to remove doubts about the cause of a crash that had been discussed for over thirty years, after an 'open verdict' had been recorded by the coroner. Nonetheless, it was the plaintiff who first spoke out to attack the first defendant. On the front page of the *Daily Express* of 7 April, headed 'Harris Dares Yong, Jeffrey', the plaintiff was reported as having issued a statement about the call for an enquiry: 'It is mischievous and directed to ridicule and defame me'. He challenged the first defendant to repeat his remark and allegation 'openly and in public'. The plaintiff gave his own account of the matter, claiming that Tengku Razaleigh was never booked on the fatal flight;

(d) several important matters arise from the plaintiff's challenge: first, it was a case of voluntary assumption of risk — the plaintiff incited the first defendant to repeat the inquiry call, having identified himself as a person who would be defamed by the repetition. Second, the plaintiff's statement was defamatory of the first defendant, describing him as mischievous and as a defamer. Under *Adam v Ward* privilege, the first defendant was entitled to defame his attacker when answering back. The plaintiff had put his account on the public record, and there was subsequently no need for the first defendant to repeat the plaintiff's version — it would be fresh in the minds of readers of the *Daily Express*;

(e) the first defendant responded, as he was fully entitled to do, and his response was carried in *Daily Express* of 9 April, under the heading 'Basis to re-open due to New Info: Yong'. It was plainly a response by the first defendant to the plaintiff's attack on him for being mischievous. He said that people would want to reexamine the crash in view of the new revelation;

(f) the second statement was incited by the plaintiff, and merely set out the first defendant's argument for a new investigation because new information had come to light. He did not imply that the crash was the result of crime — he spoke also of 'accidents' and 'unexplained incidents'. His examples of Kennedy and King were examples of cases that are constantly being reinvestigated, and did not imply that the crash was to be considered as an assassination: Princess Diana's death was also mentioned, and that had been proved to have been an accident. Although the first defendant asked for the incident to be reinvestigated, he did not actually ask for the plaintiff to be investigated. There is a world of difference between the two statements;

(g) it is submitted that the learned trial judge's finding that the words of both articles were defamatory, insinuating that the plaintiff had 'blood on his hands' and was an assassin, was not rational and did not properly apply the 'ordinary reader' test for defamation. The three articles must be taken together and the question is whether the ordinary reader — not unduly suspicious and not avid for scandal — would think that the first defendant was accusing the plaintiff of being a mass murderer. The ordinary reader would find no such accusation in the words calling for an inquiry. There was no insinuation that the plaintiff was, or might be, guilty of sabotage;

(h) the Court of Appeal did not find it necessary to deal with whether the words really were defamatory. The defendants contended that the words are not defamatory, but if they are, they are of the lowest level, namely, level 4 — the plaintiff might conceivably be involved in a crime related to the crash of the plane; and

(i) level 4 would be the only possible level on which the first defendant's statements might be said to defame the plaintiff. And it is a most far-fetched level, given the eight different causes that have been advanced as responsible for the crash, including overcrowding, pilot error, pilot suicide, deficiency of the plane and foul play.

Public interest

[24] On the issue of public interest, learned counsel for the defendants submitted that in the application of *Reynolds* privilege, the low level of seriousness of the allegation is a factor to be weighed in support of the contrary right to speak out on an issue of public interest. There could hardly be anything more momentous in the history of a state and its people than a tragedy that took the lives of its newly elected government and Chief Minister. The tragedy is solemnly commemorated on 6 June every year. Yet it has never been properly investigated or subjected to any authoritative public inquiry. There could be no more legitimate public interest than in calling, when a new revelation comes out, for an inquiry into these deaths. The coroner returned an *open verdict*, which means that there is a continuing legal duty to establish their cause. The first defendant was acting in accordance with that duty when, on new information emerging, he called for the inquiry to be reopened.

[25] It was contended that the Court of Appeal decided in para 11 of its judgment that the public interest in having such an inquiry was overwhelming. It was therefore submitted that the publication by the first defendant of his call for an inquiry in light of fresh evidence was protected by *Reynolds* (or 'public interest') privilege, which could be lost only if he behaved irresponsibly. The protected publication was:

(a) a statement of fact (uncontested at trial) that Tengku Razaleigh had made the revelation;

(b) a further fact (uncontested at trial) that it was new information — ie a genuine revelation; and

(c) a comment, that the above facts called for or justified a reopening of the case.

[26] On the submission made on behalf of the plaintiff that *Reynolds* privilege does not apply to facts already known to the public, learned counsel for the defendants submitted that, that is not correct. *Reynolds* privilege applies to any statement made where there is 'some real public interest in having the information in the public domain'. *Flood v Times Newspapers Ltd* [2012] 2 AC 273 was cited in support. According to learned counsel for the first defendant, the latter was leader of a political party — President of SAPP with two members of parliament and two state assemblymen. The information that he put in the public domain was not a repetition of Tengku Razaleigh's revelation, but the comment that it was new and deserving of further inquiry.

[27] On the issue of responsible journalism, learned counsel for the defendants submitted that given the public interest in the first defendant's call for an inquiry, this call attracted 'Reynolds' common law privilege which could be lost only through 'irresponsible journalism' — a shorthand for a blameworthy failure to check the basic facts. In this case, as the Court of Appeal held, the basic fact that he was under a duty to check was that Tengku Razaleigh had actually made the revelation. The uncontested evidence was that he did so check, and established that Tengku Razaleigh had made the revelation at lunch when he came to Sabah on 2 April 2010, and had repeated it to the shock and surprise of 1,000 people in his speech that evening. There was no dispute about this. The first defendant had checked to ensure that the revelation was made, and knew from his own reading of books about the incident that it had never been made before. Moreover, the first defendant knew that it was at least credible — one does not readily forget the moment one's life was saved; and was newsworthy — the *Daily Express* had published it prominently, as it subsequently published his call for an inquiry.

[28] Thus, it was submitted that the first defendant had made all the checks that were necessary to justify his call for an inquiry. He had checked that the revelation had been made and that it was new. Obviously he did not have to establish whether the revelation was true, because that would be the job of the very inquiry for which he was calling. On the plaintiff's claim that the first defendant should have made a police report, this is absurd, because the first defendant was not accusing anyone of a crime. The first defendant was asking for the inquiry to be 're-opened'. The coroner's verdict was still 'open' and the

A first defendant did not know where it would lead. The first defendant did check with those present at the forum where Tengku Razaleigh delivered his speech. He did not immediately proceed to issue the statement. He chose to be prudent and waited until after the publication of the *Daily Express*; a clear display of responsible journalism on the first defendant's part.

B

[29] On the issue of malice, it was submitted that it (malice) is now subsumed under 'responsible journalism' in cases of *Reynolds* privilege. There is no evidence that the first defendant set out to lie about Tengku Razaleigh's revelation, or that he was indifferent to its truth. On the contrary, the first C defendant wanted it investigated. Nor was there evidence that a legal dispute with the plaintiff, 11 years before, had so poisoned the first defendant's mind that he would make false allegations against the plaintiff. The only issue is whether the first defendant checked the factual foundation for his call for an D inquiry — and he did.

[30] It was submitted that in this case, the fact that was relevant was that Tengku Razaleigh had actually made the revelations, and that it was new. The first defendant did not merely rely on the *Daily Express* report, he made further E enquiries to ensure that the report was accurate and the revelation was made, and that it had not been published in either of the books about the incident. That was all he had to do for what was, at most, a level 4 'defamation by implication'. *Flood v Times Newspapers Ltd* was cited in support. The implied defamation in the circumstances entitled the first defendant to the protection F of the *Reynolds* privilege.

[31] On the sole question in respect of which the leave to appeal was granted, it was submitted that if the question is read as asking whether *Reynolds* privilege G protects information subsequently found to be inaccurate or untruthful, the answer is in the affirmative, if the two conditions (public interest and responsible journalism) are met. It was precisely to protect such information which could not be proved true (ie could not be defended by a plea of justification) that *Reynolds* was developed. If the question refers to information H which is doubtful or questionable at the time it is published, the answer will also be in the affirmative, so long as there have been responsible checks made which have not shown in the information to be false. In this case, the information had the ring of credibility (a man is not likely to forget the circumstances in which his life was saved) and although Tengku Razaleigh's I recollection was called into question by the plaintiff's recollection, as published on the 7 April 2010, the point of calling for an inquiry was that the inquiry itself could resolve this dispute. Thus, *Reynolds* privilege can protect statements of fact that are themselves open to question if the gist of the publication is to call for an inquiry into whether they are true.

[32] In respect of information which is already known, statements may be protected by *Reynolds* privilege even though information in them is already known to the public, so long as they are of public interest and made responsibly. In this case the issue does not arise, because although Tengku Razaleigh's revelation was reported by the *Daily Express* on 4 April 2010, the 'information' that was published by the first defendant on 5 April 2010 and 9 April 2010 was not mere repetition — it was information that Tengku Razaleigh's revelation was new and justified an inquiry, and that an inquiry had been called for by the first defendant, who was the leader of a political party. These elements had obviously not been known to the public until the first defendant's two press statements.

[33] On the *Reynolds* ten point tests suggested by Lord Nicholls, it was submitted that the tests were met. The submission made is as follows:

(a) *seriousness*. If it was defamatory at all, this was a level 4 case, of defamation by implication. The plaintiff had identified himself and had assumed the risk when he defamed the first defendant and challenged him to repeat a non-defamatory call for an inquiry. There was no allegation of mass murder or that the plaintiff had 'blood on his hands';

(b) *the extent to which the subject matter was of public concern*. To a very great extent, still, in Sabah, the deaths of its Chief Minister and many of his cabinet are still of public concern;

(c) *source*. There could be no suggestion that the original source, Tengku Razaleigh, had an axe to grind. Nor did the *Daily Express*, in publishing on 4 April 2010 the report of Tengku Razaleigh's revelation;

(d) *steps taken to verify*. The Court of Appeal was satisfied that the first defendant had made enquiries to verify that Tengku Razaleigh had made the revelation;

(e) *status of the information*. It was fresh evidence, and had never been investigated. It came from a credible person — Tengku Razaleigh;

(f) *urgency*. News is perishable, and the first defendant as a political leader was right to comment as soon as possible. He was, moreover, incited and provoked by the plaintiff's attack on him on 7 April 2010 to make his second press statement;

(g) *whether comment was sought from the plaintiff*. This was unnecessary because the plaintiff had given his version of events on 7 April 2010. No approach was necessary;

(h) *did it contain the gist of the plaintiff's story?* The answer is in the affirmative because the four articles — on 4 April 2010, 5 April 2010, 7 April 2010 and 9 April 2010 must be considered together. The plaintiff gave his story in detail on 7 April 2010;

(i) *tone*. Here, Lord Nicholls plainly indicated that *Reynolds* protected calls for an investigation — and that was exactly what the first defendant called for; and

(j) *circumstances*. This would include the continuing public doubts and rumours about causes of the crash; the dramatic and sudden nature of Tengku Razaleigh's revelation; the first defendant's political role as president of a party with elected representatives in calling for a measure of good government, and of course the fact that the first defendant's first statement was non-defamatory and he issued his second only after being defamed by the plaintiff and incited to repeat his call.

OUR DECISION

[34] First, the question is whether the *Reynolds* privilege defence was pleaded by the defendants. As a starting point, we refer to *Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee* [2015] 6 MLJ 187; [2015] 8 CLJ 477, where in its judgment this court referred to the House of Lords' judgment in *Reynolds* concerning the development of qualified privilege for publication of defamatory statements in the public interest. This is what Azahar Mohamed FCJ, speaking for the court said:

> [23] This then brings us into sharp focus the very important English House of Lords case of *Reynolds v Times Newspapers Ltd* concerning qualified privilege for publication of defamatory statements in the public interest. This much quoted case provides a good starting point. It is worth to set out the essential background facts. In that case, Mr Reynolds had been the Prime Minister of Ireland, until a political crisis in 1994. He began proceedings for defamation against the Times, the publisher of an article contained in the British mainland edition of a national newspaper. The publication related to an article to the effect that Mr Reynolds had misled the Irish Parliament. Mr Reynolds claimed that the words complained of bore the meaning that he had deliberately and dishonestly misled the Parliament and his cabinet colleagues. The Times pleaded, inter alia, the defence of qualified privilege at common law. At the trial the jury returned a verdict in Mr Reynolds's favour and he was awarded damages. The Court of Appeal set aside the jury's verdict and ordered a retrial on the ground of misdirection to the jury. The court also ruled that the publication was not covered by qualified privilege. The Times appealed, contending that the courts should recognise a generic qualified privilege encompassing the publication by a newspaper of political matters affecting the people of the United Kingdom.
>
> [24] The House of Lords rejected this contention and held that the common law should not develop a new subject matter category of qualified privilege whereby the publication of all political information would attract qualified privilege whatever the circumstances, since that would fail to provide adequate protection for reputation. It was held that it would be unsound in principle to distinguish political information from other matters of public concern. *The House of Lords agreed that the traditional ambit of qualified privilege should be extended somewhat and that it was available in respect of political information upon application of the established common*

law test of whether there had been a duty to publish the material to the intended recipients and whether they had had an interest in receiving it. The decision marked a decisive departure from the traditional pro-reputation orientation of defamation law in England and was quickly recognised as a 'media-friendly development' (see *Grant v Torstar Corp* 2009 SCC 61). As a result of *Reynolds v Times Newspapers Ltd* there is now a much more extensive protection for publications to the world at large where the matter is of sufficient public concern. This is known as *Reynolds* privilege. Lord Hoffman in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl* [2007] 1 AC 359, on the other hand said it might be more appropriately be called *Reynolds* public interest defence.

[35] Lord Hoffmann in his judgment in *Jameel and another v Wall Street Journal Europe SPRL* [2007] 1 AC 359, described this defence as the *Reynolds* public interest defence. Under this defence there is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged and the burden is on the defendant to prove the requirements of the defence are satisfied:

> [46] Although Lord Nicholls uses the word 'privilege', it is clearly not being used in the old sense. It is the material which is privileged, not the occasion on which it is published. There is no question of the privilege being defeated by proof of malice because the propriety of the conduct of the defendant is built into the conditions under which the material is privileged. *The burden is upon the defendant to prove that those conditions are satisfied.* I therefore agree with the opinion of the Court of Appeal in *Loutchansky v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 1805 at [35], [2002] 1 All ER 652 at [35], sub nom *Loutchansky v Times Newspapers Ltd (Nos 2, 3 and 5)* [2002] QB 783 that 'Reynolds privilege' is 'a different jurisprudential creature from the traditional form of privilege from which it sprang'. It might more appropriately be called the *Reynolds* public interest defence rather than privilege.

[36] In *Syarikat Bekalan Air Selangor*, following *Jameel* and *Seaga v Harper* [2008] 1 All ER 965, this court held that, the public interest defence should by no means synonymous with journalists or media publications. On the ground of public interests, the defence should in the same way be extended to anyone who publishes or discloses material of public interest in any medium to assist the public better comprehend and make an informed decision on matters of public interests which affect their lives. To safeguard the extension of this privilege, so that it is not abused, as a necessary balance, it is the duty of the court to robustly ensure that anyone accorded with the privilege meet the test of responsible journalism. This, underpins the significance of protecting the right of freedom of expression on the matter of public interests, whilst at the same time providing adequate protection for reputation. Freedom of expression is not absolute.

A **[37]** Reverting to the appeal before us, we are unable to accept the plaintiff's contention that the defendants could not invoke the *Reynolds* public interest defence. In their pleading, the defendants contended that the impugned statements were made on a matter of public interests, namely the investigation into the real cause of the plane crash on 6 June 1976 which took the lives of the late Tun Fuad Stephens and other State Ministers and officials who were then travelling with him. The defendants averred that the public would like to know, inter alia, why the plaintiff did not board the plane; whether it was the plaintiff who at the very last moment requested Tengku Razaleigh and two others to leave the plane and if so, why? Further, the defendants contended that the first defendant being a responsible politician, was under a legal, moral and/or social obligation to publish the words in the impugned statements.

[38] As we have said, in his submission in reply, learned counsel for the defendants submitted at length in support of his contention that the words in the impugned statements were not defamatory, and even if they were defamatory, they were of the lower level — namely that the plaintiff might conceivably be involved in a crime related to the crash of the plane. However, the Court of Appeal accepted the correctness of the learned trial judge's ruling that the impugned statements were defamatory and the defence of justification did not avail the defendants. It allowed the defendants' appeal because it found that the defence of qualified privilege was not properly considered by the learned trial judge, and that the law on the subject of qualified privilege was not properly applied by His Lordship's to the facts of the case. This is what the Court of Appeal said:

> 9. *Whilst we have no reason to question the correctness of His Lordship's ruling that the statements were defamatory and that the defence of justification did not avail the appellant*, we allowed this appeal because we are satisfied that the defence of qualified privilege was not properly considered by the learned trial Judge and the law on the subject not properly applied to the facts of this case.

[39] In this regard, it is important to note that the defendants did not prefer any cross-appeal against that aforesaid decision of the Court of Appeal. It is too late in the day for the defendants to regurgitate the issue as to whether the impugned statements were defamatory. More importantly, we have, on our part, considered all the evidence in this case and the findings of the courts below. We find no reason to disturb the findings of both the courts that the impugned statements were defamatory of the plaintiff.

[40] As it is clear from para 38 of this judgment, the sole ground upon which the Court of Appeal allowed the defendants' appeal was because it found that the defence of qualified privilege was not properly considered by the learned trial judge, and that the law on the subject of qualified privilege was not properly applied by His Lordship to the facts of this case.

[41] In para 12 of its judgment the Court of Appeal said the law on the defence of qualified privilege has been refined to protect disclosures by the maker of a statement so long as the maker is able to satisfy the court that it is in the interest of the public to receive frank and uninhibited communication of particular information. The Court of Appeal said that Lord Nicholls expounded this defence in terms of his judgment in the House of Lords in *Reynolds* which the Court of Appeal then quoted. If the statement of the Court of Appeal was intended to refer to the defence of qualified privilege as it evolved as a *Reynolds* public interest defence (or simply as *Reynolds* defence), then what was said by the Court of Appeal at the beginning of para 12 of its judgment was not sufficient to establish the public interest defence. To establish public interest defence two elements need to be established, namely: (i) It is in the public interest that the impugned statements be made; (ii) the first defendant had acted responsibly in publishing the statements (the responsible journalism element). More of this later when we deal with the said defence in a greater detail. The passage in the judgment of Lord Nicholls quoted by the Court of Appeal in para 12 of its judgment is as follows:

> The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying *public interest* on which privilege is founded. The essence of this defence lies in the law's recognition of the need, *in the public interest*, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the Court has to assess whether, in the public interest, the publication should be protected in the absence of malice.
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> In determining whether an occasion is regarded as privileged the Court has regard to all the circumstances: see, for example the explicit statement of Lord Buckmaster LC in *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at p 23; [1916–17] All ER Rep 452 at p 456 ('every circumstance associated with the origin and publication of the defamatory matter'). And circumstances must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.
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> Privilege and publication to the world at large Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged. But the common law has recognised there are occasions when the public interest requires that publication to the world at large should be privileged. In *Cox v Feeney* [1863] 4F & F 13 at p 19; 176 ER 445 at p 448 Cockburn CJ approved an earlier statement by Lord Tenterden CJ that 'a man has a right to publish, for the purpose of giving the public information, that which it is proper for the public to know. Whether the public interest so requires depends

upon an evaluation of the particular information in the circumstances of its publication. Through the cases runs the strain that, when determining whether the public at large had a right to know the particular information, the court has regard to all the circumstances. The court is concerned to assess whether the information was of sufficient value to the public that, in the public interest, it should be protected by privilege in the absence of malice.

[42] That passage in Lord Nicholls's judgment referred to by the Court of Appeal occurs when His Lordship traced the development of the traditional defence of qualified privilege. Indeed, immediately prior to that passage His Lordship referred to the element of reciprocity in the principle underlying the defence — to the effect that there must exist between the maker of the statement and the recipient some duty or interest in making the communication, for which the often-quoted dictum of Lord Atkinson in *Adam v Ward* [1916–17] All ER Rep 157 at p 170; [1917] AC 309 at p 334, was referred to. It appears to us therefore that in para 12 of its judgment, the Court of Appeal was directing its mind to the traditional defence of qualified privilege. This is reinforced by what it said in paras 13–14 of its judgment when it held:

> [13] In our judgment, in the face the facts set out in paragraph 11 above and applying the law expounded by Lord Nicholls, the appellant's statements were issued on a privileged occasion since the respondent had a duty or, at the least, an interest as a politician and the leader of a political party to communicate to the public at large through his first and second statements, the contents of the Tengku Razaleigh's revelations and to call for the fresh inquiry into the causes of the crash. In our judgment, a careful examination of the reason advanced by His Lordship in refuting proof of the first ingredient of this defence was merely to conclude that:
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> > similarly in the present case the defendants had no duty to communicate the information to the press and neither the press nor the world at large had common interest to receive the information in the way it was presented by the first defendant was in truth and substance an insinuation of criminal conduct on the part of the plaintiff.
>
> With respect, the law is settled that the fact that the statement is defamatory does not prevent the occasion from being a privileged occasion. Whether the appellant abused the occasion by being actuated by malice so as to deprive the occasion from being a privileged one, is an entirely different issue.
>
> *MALICE*
>
> [14] We now propose to examine the facts to ascertain whether the appellant was actuated by malice.

[43] Malice, if established by the defendants, will defeat the privilege. This is the traditional form of qualified privilege (see *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279, per Lord Hoffmann at paras 46 and 50). We hasten to add that subtopic 'Malice' in the judgment of the Court

of Appeal contains paras 14–22 in which it dealt with the issue of malice before holding at para 23 that the defendants succeeded in establishing the defence of qualified privilege.

[44] Reverting to Lord Nicholls's judgment in *Reynolds*, His Lordship then spoke of striking an appropriate balance between the freedom of expression and the protection of reputation:

> Likewise, there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. *Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.* In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.
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> *Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation*. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. *Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely.* In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, *human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.*
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> *The crux of this appeal, therefore, lies in identifying the restrictions which are fairly and reasonably necessary for the protection of reputation*. Leaving aside the exceptional cases which attract absolute privilege, the common law denies protection to defamatory statements, whether of comment or fact, proved to be actuated by malice, in the *Horrocks v Lowe sense* ... This common law limitation on freedom of speech passes the 'necessary' test with flying colours. This is an acceptable limitation. *Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth.*
>
> In the case of statements of opinion on matters of public interest, that is the limit of what is necessary for protection of reputation. Readers and viewers and listeners can make up their own minds on whether they agree or disagree with defamatory statements which are recognisable as comment and which, expressly or implicitly, indicate in general terms the facts on which they are based.

A With defamatory imputations of fact the position is different and more difficult. Those who read or hear such allegations are unlikely to have any means of knowing whether they are true or not. In respect of such imputations, a plaintiff's ability to obtain a remedy if he can prove malice is not normally a sufficient safeguard. Malice is notoriously difficult to prove. If a newspaper is understandably unwilling to B disclose its sources, a plaintiff can be deprived of the material necessary to prove, or even allege, that the newspaper acted recklessly in publishing as it did without further verification. Thus, in the absence of any additional safeguard for reputation, a newspaper, anxious to be first with a 'scoop', would in practice be free to publish seriously defamatory misstatements of fact based on the slenderest of materials. C Unless the paper chose later to withdraw the allegations, the politician thus defamed would have no means of clearing his name, and the public would have no means of knowing where the truth lay. *Some further protection for reputation is needed if this can be achieved without a disproportionate incursion into freedom of expression*.

D This is a difficult problem. No answer is perfect. Every solution has its own advantages and disadvantages. Depending on local conditions, such as legal procedures and the traditions and power of the press, the solution preferred in one country may not be best suited to another country. ...

As highlighted by the Court of Appeal judgment in the present case, the common law solution is for the court to have regard to all the circumstances when deciding E whether the publication of particular material was privileged because of its value to the public. Its value to the public depends upon its quality as well as its subject-matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular circumstances of individual cases in their infinite variety. It can be applied appropriately to all F information published by a newspaper, whatever its source or origin.

Hand in hand with this advantage goes the disadvantage of an element of unpredictability and uncertainty. The outcome of a court decision, it was suggested, cannot always be predicted with certainty when the newspaper is deciding whether to publish a story. To an extent this is a valid criticism. A degree of uncertainty in G borderline cases is inevitable. This uncertainty, coupled with the expense of court proceedings, may 'chill' the publication of true statements of fact as well as those which are untrue. The chill factor is perhaps felt more keenly by the regional press, book publishers and broadcasters than the national press. However, the extent of this uncertainty should not be exaggerated. With the enunciation of some guidelines by the court, any practical problems should be manageable. The H common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection. ...

... I

The common law approach does mean that it is an outside body, that is, some one other than the newspaper itself, which decides whether an occasion is privileged. This is bound to be so, if the decision of the press itself is not to be determinative of the propriety of publishing the particular material. The court has the advantage of being impartial, independent of government, and accustomed to deciding disputed

issues of fact and whether an occasion is privileged. No one has suggested that some other institution would be better suited for this task. A

[45] At pp 625–627, Lord Nicholls set out his conclusion. The following passage in His Lordship's judgment which contains the ten point tests is the foundation of the *Reynolds* public interest defence: B

> My conclusion is that the established common law approach to misstatements of fact remains essentially sound. The common law should not develop 'political information' as a new 'subject-matter' category of qualified privilege, whereby the publication of all such information would attract qualified privilege, whatever the circumstances. That would not provide adequate protection for reputation. Moreover, it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. *The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case*. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. C D
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> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject-matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing. E F G
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> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up. H

[46] In para 16 of its judgment, the Court of Appeal said that a careful examination of the law set out in para 9 of its judgment reveals that the fact that the statement 'is in fact untrue and defamatory' did not preclude the defence of qualified privilege from availing the defendants. According to the Court of Appeal, *it is trite law that qualified privilege as a live issue only arises where the* I

statement is defamatory and untrue. In support, the Court of Appeal referred to para 32 of the judgment of Lord Bingham of Cornhill in *Jameel*. So, according to the Court of Appeal, the learned trial judge fell into serious error in dissecting the speech of Tengku Razaleigh to ascertain the truth of the content of the same before concluding that to the extent that the first defendant had not verified the truth of the contents of Tengku Razaleigh's speech, 'he is therefore to be treated as if he knew the revelation to be false'. With respect, the underlined sentence is only part of what Lord Bingham said at para 32. That sentence is incomplete. It is important to consider the whole of para 32 which reads as follows:

> *Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed (*[1999] 4 All ER 609 *at p 623,* [2001] 2 AC 127 *at p 202) a test of responsible journalism*, a test repeated in *Bonnick v Morris* [2002] UKPC 31 at paras [22]–[24], (2002) 12 BHRC 558 at paras [22]–[24], [2003] 1 AC 300. The rationale of this test is, as I understand, *that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify*. As Lord Hobhouse observed with characteristic pungency ([1999] 4 All ER 609 at p 657, [2001] 2 AC 127 at p 238), 'No public interest is served by publishing or communicating misinformation'. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

It is clear that actually Lord Bingham was explaining the test of responsible journalism proposed by Lord Nicholls in *Reynolds*. Lord Nicholls proposed a test of responsible journalism, assuming the matter to be one of *public interest*. In other words, in the first place, the matter must be one of public interest before you can consider the issue of responsible journalism. The rationale of the test is that there is no duty to publish, and the public have no interest to read material which the publisher has not take reasonable steps to verify. Quoting Lord Hobhouse in *Reynolds*, 'No public interest is served by publishing or communicating misinformation. But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication'.

[47] In para 18 of its judgment, the Court of Appeal said that the learned trial judge fell into serious error in ruling that the first defendant acted with malice because he called for reopening of investigations when this did not form part of Tengku Razaleigh's speech. In other words, in the learned trial judge's view, since the first defendant's call for reopening of the original investigations were defamatory and this call did not form part of Tengku Razaleigh's revelation, the first defendant cannot rely on the defence of qualified privilege. The Court of Appeal held that this is not the proper application of the law of qualified privilege. What the Court of Appeal set out in para 18 is not a complete and accurate synopsis of the learned trial judge's ruling on malice. The first reason given by the learned trial judge in finding evidence of malice on

the part of the defendants was the first defendant's failure to verify with Tengku Razaleigh on the accuracy of his revelation. The learned trial judge said the first defendant should have verified, because Tengku Razaleigh was available and that it was easy for him to do so. So, in the learned trial judge's view, the first defendant did not care whether the Tengku Razaleigh's revelation was true or not. The first defendant was therefore to be treated as if he knew that the revelation was false. This indifference and could not careless attitude was evidence of malice on the part of the first defendant and by extension the second defendant. The learned trial judge's ruling as such was a purported application of the test of malice as expounded by Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662. Next, the learned trial judge questioned the first defendant's motive in calling for a reinvestigation of the air crash? Was it a bona fide call for a fresh investigation or was it a call to investigate the plaintiff for a possible criminal act? According to the learned trial judge, there is a subtle difference between the two motives. This is where the learned trial judge remarked that Tengku Razaleigh in his speech did not call a reinvestigation of the air crash, let alone to suggest that the plaintiff was an accessory to a criminal act. That actually was the context in which the learned trial judge's observation about nature of Tengku Razaleigh speech was made. The learned trial judge held that what first defendant did was to give his own slant to Tengku Razaleigh's revelation in order to cast aspersion on the plaintiff and that defendants had seized on the occasion to provoke public speculation that the plaintiff was up to no good when he asked Tengku Razaleigh to board another plane at the last moment. This, according to the learned trial judge was unfair to the plaintiff because the first defendant himself knew that there was conflicting historical accounts of the events prior to the crash. The Court of Appeal then said that 'the law requires the judge to consider the first defendant's two statements as a whole, and if the article as a whole is justified, then, the defence of qualified privilege avails the first defendant even if the article is defamatory and some facts untrue'. Paragraph 34 of Lord Bingham's judgment in *Jameel* was referred to in support. With respect, in the context of the discussion of the issue of malice (which the Court of Appeal appeared to be considering), this statement is misleading. Lord Bingham was not talking about malice, but about public interest; the first element of the *Reynolds* defence. Lord Bingham was commenting on 'the particular information' referred to by Lord Nicholls in his speech in *Reynolds v Times Newspapers Ltd and others* [1999] 4 All ER 609 at p 619. Lord Nicholls was then referring to the Court of Appeal's decision in *Reynolds*. His Lordship said:

> In its valuable and forward-looking analysis of the common law, the Court of Appeal in the present case highlighted that in deciding whether an occasion is privileged the court considers, among other matters, the nature, status and source of the material published and the circumstances of the publication. In stressing the importance of these particular factors, the court treated them as matters going to a question (the circumstantial test) separate from, and additional to, the conventional duty-interest questions (see [1998] 3 All ER 961 pp at 994–995, [1998] 3 WLR

> 862 at p 899). With all respect to the Court of Appeal, this formulation of three questions gives rise to conceptual and practical difficulties and is better avoided. There is no separate or additional question. These factors are to be taken into account in determining whether the duty-interest test is satisfied or, as I would prefer to say in a simpler and more direct way, whether the public was entitled to know *the particular information*. The duty-interest test, or the right to know test, cannot be carried out in isolation from these factors and without regard to them.

Lord Bingham then explained the situation in which the particular publication complained of relates to one particular ingredient of a composite story, where it is open to a plaintiff to contend (as in *Jameel* but not in the case before us) that the article could have been published without inclusion of the particular ingredient complained of. In such a case, consideration should be given to the thrust of the article published. If the thrust of the article is *true*, and the *public interest* is satisfied, the inclusion of an *inaccurate* fact may not have the appearance of irresponsibility as it might if the whole thrust is untrue. Then, in para 19 of its judgment, the Court of Appeal said even if the first defendant's call for the reopening of the investigation was defamatory, and that this did not form part of Tengku Razaleigh's revelation, in order to rule against the first defendant on the ingredient of malice, the learned trial judge ought to have considered the two statements as a whole to determine 'whether the inclusion of the defamatory statement was justified' in the light of Tengku Razaleigh's revelation, the making of which is true. Paragraph 51 of Lord Hoffmann's judgment in *Jameel* was cited as authority. It is true that in that paragraph Lord Hoffmann was talking about the inclusion of the defamatory statement. However, His Lordship was not talking about the ingredient of malice. Indeed, in para 50 of his judgment, in comparing *Reynolds* defence with the traditional privilege defence, His Lordship said that in the former there is no burden upon the claimant to establish malice to defeat it:

> The *Reynolds* defence is very different from the privilege discussed by the Court of Appeal in *Blackshaw v Lord* [1983] 2 All ER 311; [1984] QB 1 where it was contemplated that in exceptional circumstances there could be a privileged occasion in the classic sense, arising out of a duty to communicate information to the public generally and a corresponding interest in receiving it. The Court of Appeal there contemplated a traditional privilege, liable to be defeated only by proof of malice. But the *Reynolds* defence does not employ this two-stage process. *It is not as narrow as traditional privilege nor is there a burden upon the claimant to show malice to defeat it*.

[48] Paragraph 51 of Lord Hoffmann's judgment opens up with the sentence 'If the article as a whole concerned a matter of *public interest*, the next question is whether the inclusion of the defamatory statement was justifiable'. So, the first element which must be established is whether the article as a whole concerned a matter of public interest. If it is, then comes the second question — whether the inclusion of the defamatory statement is *justified*? However, the fact that the material was of public interest *does not allow* the newspaper to drag

in damaging allegations which serve no public purpose. They must be part of the story. The more serious the allegation, the more important is that it should make real contribution to the public interest element in the article. The question of whether the defamatory statement should have been included is often a matter of how the story should have been presented. In considering this question, the court must give allowance for editorial judgment. In *Jameel*, the claimants are Saudi Arabians. The first claimant is the President of the Abdul Latif Jameel Group, an international trading conglomerate based in Saudi Arabia. The second claimant is a company incorporated in Saudi Arabia and is part of the group. The article published by the defendant which gave rise to the court proceeding, was headed 'Saudi Officials Monitor Certain Bank Accounts' with a smaller subheading 'Focus Is On Those With Potential Terrorist Ties'. The gist of the article stated in the first paragraph, was that the Saudi Arabian Monetary Authority, the Kingdom's Central Bank, was, at the request of the United States Law Enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, for the funding of funds to terrorist organisations. In the second paragraph, a number of companies and individuals were named, among them, 'The Abdul Latif Group of Companies'. The jury found that the article defamed the claimants. The defendant's defence of *Reynolds* privilege was rejected by the trial court and the Court of Appeal. The House of Lords reversed those decisions. Paragraph 52 in Lord Hoffmann's judgment in *Jameel* illustrates how the aforesaid principle was applied in the case. His Lordship said:

> In the present case, the inclusion of the names of large and respectable Saudi businesses was an important part of the story. It showed that co-operation with the United States Treasury's requests was not confined to a few companies on the fringe of Saudi society but extended to companies which were by any test within the heartland of the Saudi business world. To convey this message, inclusion of the names was necessary. Generalisations such as 'prominent Saudi companies', which can mean anything or nothing, would not have served the same purpose.

In *Jameel* therefore, the inclusion of the names of large and respectable Saudi businesses was an important part of the story. It showed that cooperation with the United States Treasury's request was not confined to a few companies on the fringe of Saudi's society, but extended to companies which were by any test, within the heartland of the Saudi business world. That was the *message* to be conveyed. To convey that message, inclusion of the names of the claimants' companies was necessary, as generalisations such as 'prominent Saudi companies', which can mean anything or nothing, would not have served the same purpose.

[49] Reverting to the present appeal, we can accept that the impugned statements concerned a matter of public interest — the Nomad plane crash on 6 June 1976 in Sabah (the double six tragedy) which took the lives of all on

board the plane including Tun Fuad Stephens and some of the Berjaya Cabinet Ministers, as well as the speech on the topic of 'Minyak Sabah Untuk Siapa' by Tengku Razaleigh on 2 April 2010 which was published on 4 April 2010 with caption 'Invite saved my life: Razaleigh'. However, even after giving maximum latitude to editorial judgment, we find that it was not necessary to embellish and spice up what Tengku Razaleigh had revealed in his speech with insinuation of the plaintiff's possible complicity in the commission of a criminal act. Tengku Razaleigh merely said that, 'Apabila cakap hal minyak dan Sabah, tak dapat tiada saya mesti mengingat kembali peristiwa yang amat sedih yang berlaku di sini yang menimpa rakyat Sabah dan negeri Sabah terutama sekali. Saya ingat dalam bulan Jun tahun 76, satu kemalangan besar berlaku di Sabah. Umur saya panjang, orang kenalan saya yang saya sanjung tinggi umurnya pendek. Allahyarham Yang Amat Berhormat Tun Fuad Stephens dan anaknya sekali dengan pemimpin-pemimpin yang lain dari negeri Sabah dan juga pegawai-pegawai dari negeri Sabah dan dari kerajaan pusat bersekali dengan setiausaha sulit saya telah menjadi mangsa nahas apabila jatuhnya kapal terbang yang dinaiki mereka. Saya sendiri sudahpun menaiki pesawat berkenaan bersekali dengan Tun Rahman Yaakob dan bersama-sama dengan saya melawat Labuan dan juga Sabah ketika itu dan dengan Almarhum Tengku Arif Bendahara Pahang. *Kita semua sudah 'strapped' dah pakai tali pinggang kapal terbang. Saya duduk di belakang Allahyarham Tun Fuad Stephens,sebelah kanan saya Tun Rahman Yaakob, sebelah belakang saya Tengku Arif Bendahara Pahang. Tiba-tiba Datuk Harris yang pada masa itu menjadi Timbalan Ketua Menteri Sabah mengajak saya keluar kapal terbang, kerana dia kata elok kita ke Pulau Banggi melihat rancangan belaan sapi dari Australia di Pulau Banggi*. Saya pun ajak Tun Rahman Yaakob dan Tengku Arif Bendahara bersama dengan saya turun kerana saya kata elok juga kita ikut Datuk Harris ke Pulau Banggi kerana saya nak tengok rancangan bela sapi, kita panggil lembu, di Pulau Banggi. Jadi kita pun ikut Datuk Harris, ikut kapal terbang jenis yang sama Nomad, kita pergi ke Pulau Banggi'. Tengku Razaleigh was merely expressing his sadness upon recalling the double six tragedy which had taken the lives of some of his most revered friends and recounting how he and two others alighted from the fatal flight minutes before its take-off on the invitation of the plaintiff which saved his life. Tengku Razaleigh did not say anything or even hint about the cause of the crash. Tengku Razaleigh did not even hint let alone call for a reinvestigation into the crash. But the first defendant went beyond what Tengku Razaleigh had mentioned in his speech, and speculated, and embellished Tengku Razaleigh's speech with insinuation of the plaintiff's possible complicity in criminal act of multiple murders.

[50] For the defendants it was contended that the impugned statements were neutral in nature, in that in calling for the opening up of reinvestigation, the first defendant merely said, 'maybe nothing new will come out of the investigation'. However, the first defendant did not stop there. Not only did he add 'or may be something big and explosive will surface from the depth of

history', he had spiced it up with references to the assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto. We are at pains to fathom how the inclusion of the defamatory statements had made any contribution (let alone real contribution) to the public interest element in the publication (ie the air crash). In our judgment, contrary to the finding of the Court of Appeal, the inclusion of the defamatory statements was not justified. At para 21 of its judgment, the Court of Appeal, while still deliberating on the question whether the inclusion of the defamatory statements in the publication by the first defendant was justified, ruled that applying Lord Hoffmann's pronouncement in para 51 of his judgment in *Jameel* as aforesaid to the facts before it, the first defendant's call for reinvestigation made 'a real contribution to public interest element in the article'. The Court of Appeal criticised the learned trial judge in answering this question (the public interest question) in the negative, in doing which, according to the Court of Appeal, the learned trial judge was unduly influenced by his earlier finding that Tengku Razaleigh's revelation was untrue because it was in conflict with the versions to be found in the two books, namely, 'Harris Salleh of Sabah' and 'The Sabahans — The Life and Death of Tun Fuad Stephens' (which the first defendant admitted as his reference books). According to the Court of Appeal, the answer to the question (whether the inclusion of the defamatory statements was justified) ought to have been determined by the application of the three of the ten points tests propounded by Lord Nicholls in *Reynolds*. This is what the Court of Appeal said:

> [21] Applying Justice Hoffman's pronouncements to the facts of this case, in our judgment, the appellant's call made 'a real contribution to the public interest element in the article'. The learned trial judge in answering this question in the negative was, in our judgment, unduly influenced by His Lordship's earlier finding that Tengku Razaleigh's revelations were untrue because they were in conflict with the version to be found in the two books. In our judgment, the answer to this question ought to have been determined by the application of three of the ten points test propounded by Justice Nicholls in the *Reynolds v Times Newspapers Ltd*. The first test related to the seriousness of the allegation. The principle being the more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. Secondly, the fifth test which related to the status of the information. The principle being that the call for the re-opening of the investigations *is unjustified* if the previous investigations had reached a conclusion which commands respect. The third test being the tone of the article. The issue being whether the article merely raised queries or a call for investigations as opposed to asserting false allegations in the form of a statement of fact.
>
> [22] In our judgment, the appellant's call for the re-opening of the investigations does not run foul of any of the aforesaid three tests. First, because the earlier investigations did not result in the publication of a report as regards the causes for the crash. Secondly, the versions in the two books vary from Tengku Razaleigh's revelations and there is no evidence that Tengku Razaleigh is the source for the versions of the crash contained in the two books. For this reason, his revelations clearly amounted to new information which warranted a fresh look at the crash.

Hence, the justification for the appellant's call for fresh investigations to clear all doubts for the cause of the crash. Finally, the tone of the article cannot be said to be provocative since the appellant merely called for a re-opening of the investigations and acknowledged the fact that the fresh investigations based on Tengku Razaleigh's revelations may result in nothing at all. The fact of the matter is that the appellant's call for the re-opening of the investigations ties in with Tengku Razaleigh's revelations and the inconclusive nature of the earlier investigations.

[51] With respect, we find it difficult to agree with the aforesaid finding. The ten point tests is for the determination of the element of responsible journalism (the second essential element in *Reynolds* public interest defence), of which no reference at all was specifically made by the Court of Appeal in its judgment. This is clear from several leading authorities including *Syarikat Bekalan Air Selangor* and *Jameel*. In *Syarikat Bekalan Air Selangor*, explaining the *Reynolds* privilege defence, this court said:

> [34] The *Reynolds* privilege defence is predicated on public interest and 'responsible journalism'. In the context of the present case, the Reynolds privilege defence required the defendant first, to establish that the impugned words were uttered on a matter of public interest and the public had a corresponding interest in receiving the same. Once that was established, the court must consider whether the defendant acted reasonably in publishing the impugned words. *This second test has been described as the test of 'responsible journalism' (see Reynolds v Times Newspapers Ltd and Jameel And Another v Wall Street Journal Europe SPRL*. Although the test refers to 'journalism', it is merely a convenient description because as we have decided earlier the *Reynolds* privilege defence is in no way limited to journalistic publications. If the defendant passed the test of responsible journalism, the issue would be determined in his favour. Lord Nicholls in *Reynolds v Times Newspapers Ltd* sets out a number of factors to be taken into account in determining the issue of responsible journalism. These factors, which are not exhaustive, are, inter alia, as follows:
>
> (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> (2) The nature of the information, and the extent to which the subject matter is a matter of public concern.
>
> (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> (4) The steps taken to verify the information.
>
> (5) The status of the information. The allegation may have already been the subject of an investigation, which commands respect.
>
> (6) The urgency of the matter. News is often a perishable commodity.

(7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

(10) The circumstances of the publication, including the timing.

[35] In the present case, the impugned words uttered by the defendant was on a matter of public interest. Undeniably, the impugned words concerned the operation and management of water supply services. In fact, this was an indisputable fact. Therefore, the first test for the *Reynolds* privilege defence to apply had been fulfilled.

[36] The first test did not raise any serious difficulty. When it came to the second test, though, the defendant ran into difficulties. The question that arises is this: whether the requisite of 'responsible journalism' had been fulfilled.

[52] In *Jameel*, in applying *Reynolds* public interest defence, in his judgment, after discussing: (a) the public interest of the material (in paras 48–50); and (b) the inclusion of the defamatory material (in paras 51–52), Lord Hoffmann referred to the element of responsible journalism. His Lordship said at p 1297:

(c) Responsible journalism

53. *If the publication, including the defamatory statement, passes the public interest test, the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair.* As Lord Nicholls said in *Bonnick v Morris* [2003] 1 AC 300 at p 309:

> Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. *Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege*.

54. Lord Nicholls was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. *The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information. But I shall for conv enien ce c ontinue to des crib e this as 'responsible journalism'*.

...

58. *I therefore pass to the question of whether the newspaper satisfied the conditions of responsible journalism*. This may be divided into three topics: *the steps taken to verify the story*, the opportunity given to the Jameel group to comment and the propriety of publication in the light of US diplomatic policy at the time.

[53] So, one of the relevant elements in the determination of responsible

journalism is the steps taken to verify the information/story. The question is what verification, if any, was required on the part of the first defendant? This brings into focus the nature of the duty of verification. In this regard, the thrust of the defendants' contention is that the first defendant's duty is to check the basic facts. As held by the Court of Appeal, the basic facts that he was under a duty to check was that Tengku Razaleigh *had actually made the revelation*. The first defendant did check, and established that Tengku Razaleigh had made the revelation on 2 April 2010. From his own reading of books about the incident, the first defendant knew that it had never been made before. Therefore, it was submitted that the first defendant had made all the checks that were necessary to justify his call for an inquiry. He had verified that the revelation *had been made*, and that it was new. It was contended that the first defendant did not have to verify whether the revelation was true, because that would be the job of the very inquiry for which he was calling. In short, the defendants' case is that all they had to do was to establish that Tengku Razaleigh *made* the revelation. In other words, they claimed that their case was akin to that of a *reportage* case, where the publisher is simply reporting what others have said (see per *Baroness Hale* in *Jameel and another v Wall Street Journal Europe SPRL* [2006] 4 All ER 1279 at p 1322 para 149). For reasons which we will set out shortly, we are unable to accept the contention.

[54] In *Roberts and another v Gable and others* [2007] EWCA Civ 721, upon reviewing a number of authorities on reportage, Ward LJ made the following remarks:

> 53. What can be learnt so far from this review of the authorities is that the journalist has a good defence to a claim for libel if what he publishes, even without an attempt to verify its truth, amounts *to reportage, the best description of which gleaned from these cases is that it is the neutral reporting without adoption or embellishment or subscribing to any belief in its truth* of attributed allegations of both sides of a political and possibly some other kind of dispute.
>
> ...
>
> 61. (2) ... In a true case of reportage there is no need to take steps to ensure the accuracy of the published information...
>
> (3) ... *To qualify as reportage the report, judging the thrust of it as a whole, must have the effect of reporting, not the truth of the statements, but the fact that they were made*. Those familiar with the circumstances in which hearsay evidence can be admitted will be familiar with the distinction: see *Subramanian v Public Prosecutor* [1956] 1 WLR 965 at p 969. If upon a proper construction of the thrust of the article, *the defamatory material is attributed to another* and is not *being put forward as true*, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because *he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth*.
>
> (4) Since the test is to establish the effect of the article as a whole, it is for the judge to rule upon it in a way analogous to a ruling on meaning. It is not enough for the journalist to assert what his intention was though his evidence may well be material

to the decision. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.

(5) *This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. Once that protection is lost, he must then show, if he can, that it was a piece of responsible journalism even though he did not check accuracy of his report*.

[55] One of the cases referred to by Ward LJ in *Roberts and another v Gable and others* was *Galloway v Telegraph Group Ltd* [2006] All ER (D) 178 (Jan); [2006] EMLR 221 which is also instructive on the principle on *reportage*:

42. The doctrine is next mentioned in *Galloway v Telegraph Group Ltd* [2006] EMLR 221. The articles concerned asserted that Mr Galloway, a well-known Member of Parliament, was in the pay of Saddam Hussein, secretly receiving sums to the order of £375,000 a year, that he had diverted monies from the Oil for Food Programme thus depriving the Iraqi people whose interests he claimed to represent of food and medicine and that he had probably used the Mariam appeal as a front for personal enrichment. *The Daily Telegraph did not seek to justify these defamatory statements as true but, relying upon the fact that they were based on documents found by their reporter in Baghdad claimed that the publication was protected by privilege, inter alia, as reportage*. The Court of Appeal held:

48. It is not in dispute that the Baghdad documents were of great interest to the public and The Daily Telegraph was naturally very keen to publish them. *If the documents had been published without comment or further allegations of fact Mr Galloway could have no complaint since, in so far as they contained statements or allegations of fact it was in the public interest for The Daily Telegraph to publish them, at any rate after giving Mr Galloway a fair opportunity to respond to them*. Such publication would be reportage. The balance would come down in favour of freedom of expression, which, subject to Art 10.2, is protected by Art 10.1 of the Convention, and the statements would be protected by privilege. ...

59. It appears to us *that the newspaper was not merely reporting what the Baghdad documents said but that ... it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation*. ... the thrust of the coverage was that The Daily Telegraph was saying that Mr Galloway took money to line his own pockets. *In all the circumstances we answer the question whether the newspaper adopted and embellished the statements in the Baghdad documents in the affirmative*....

[56] In her judgment in *Jameel*, Baroness Hale made the following observation on *reportage* in the context of the issue of verification:

Secondly, the publisher must have taken the care that a responsible publisher would take to verify the information published. The actual steps taken will vary with the nature and sources of the information. ... *The requirements in 'reportage' cases, where the publisher is simply reporting what others have said*, may be rather different, but if

A the publisher does not himself believe the information to be true, he would be well-advised to make this clear. In any case, the tone in which the information is conveyed will be relevant to whether or not the publisher has behaved responsibly in passing it on.

B **[57]** *Reportage* was also explained in *Flood* in the leading judgment of Lord Phillips of Worth Matravers PSC when His Lordship discussed the duty to verify in the context of *Reynolds* public interest defence:

> [75] Not all the items in Lord Nicholls's list in *Reynolds* case [2001] 2 AC 127 at p 205 were intended to be requirements of responsible journalism in every case. *The first question is whether, on the facts of this case, the requirements of responsible journalism included a duty of verification and, if so, the nature of that duty*. I should insert a word of warning at the outset. Each case turns on its own facts. I use the phrase *'duty of verification 'as shorthand for a requirement to verify in the circumstances of this case*. My comments should not be treated as laying down principles to be applied in cases of different facts.
>
> [76] *Mr Price alleged that TNL should have verified the accusation against Sergeant Flood reported in the article. Tugendhat J concluded that Jameel's case* [2007] 1 AC 359 *was incompatible with such an obligation. He considered that Jameel's case showed that if it was in the public interest to publish the fact of an accusation, there was no obligation to verify the grounds of the allegation*. *Moore-Bick LJ commented* [2011] 1 WLR 153, para 95, that, if the judge were right, there was very little distinction to be drawn between the defence of reportage and the defence of responsible journalism in relation to the reporting of statements made by third parties.
>
> [77] *The judge was not right. Reportage is a special, and relatively rare, form of Reynolds privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it*. *Jameel*'s case was analogous to reportage because it was the fact that there were names of substantial Saudi Arabian companies on the black list that was of public interest, rather than the possibility that there might be good reason for the particular names to be listed. Just as in the case of reportage, the publishers *did not need to verify the aspect of the publication that was defamatory.*
>
> [78] *The position is quite different where the public interest in the allegation that is reported lies in its content*. In such a case the public interest in learning of the allegation lies in the fact that it is, or may be, true. It is in this situation that the responsible journalist must give consideration to the *likelihood that the allegation is true*. *Reynolds* privilege absolves the publisher from the need to justify his defamatory publication, *but the privilege will normally only be earned where the publisher has taken reasonable steps to satisfy himself that the allegation is true before he publishes it*. Lord Hoffmann put his finger on this distinction in *Jameel*'s case [2007] 1 AC 359, para 62 when he said:
>
> > *In most cases the Reynolds defence will not get off the ground unless the journalist honestly and reasonably believed that the statement was true, but there are cases ('reportage') in which the public interest lies simply in the fact that the statement was*

made, when it may be clear that the publisher does not subscribe to any belief in its truth.

[79] Thus verification involves both a subjective and an objective element. *The responsible journalist must satisfy himself that the allegation that he publishes is true. And his belief in its truth must be the result of a reasonable investigation and must be a reasonable belief to hold*. What then does the responsible journalist have to verify in a case such as this, and what does he have to do to discharge that obligation? If this were a Chase level 1 case he would have to satisfy himself, on reasonable grounds, that the claimant had in fact been guilty of corruption. His defence would not 'get off the ground' unless he reasonably believed in the claimant's guilt. This is not, however, a Chase level 1 case, see my discussion of the meaning of the article at paras 48–50 above.

[80] What did the duty of verification involve? There is authority at the level of the Court of Appeal that to justify a Chase level 2 allegation a defendant has *to adduce evidence of primary facts that constituted reasonable grounds for the suspicion alleged. These will normally relate to the conduct of the claimant. Allegations made by others cannot be relied upon. The same may be true of a Chase level 3 allegation*. The discussion in *Gatley on Libel and Slander* (11th Ed), at para 11.6 and the three cases there cited support these principles. No such hard and fast principles can be applied when considering verification for the purpose of *Reynolds* privilege. They would impose too strict a fetter on freedom of expression. Where a journalist alleges that there are grounds for suspecting that a person has been guilty of misconduct, the responsible journalist should satisfy himself that such grounds exist, but this does not necessarily require that he should know what those grounds are.

Their existence can be based on information from reliable sources, or inferred from the fact of a police investigation in circumstances where such inference is reasonable. I derive support for this conclusion from the fact that in *Jameel*'s case the House of Lords accepted that appropriate steps had been taken to verify the fact that the claimants were named on the black list where there had been reliance upon reliable sources, even though the defendants were not prepared to name them.

[58] In our judgment, Tengku Razaleigh's account of how he and two others left the aircraft at the very last moment (to use the first defendant's own words in the first statement) before its take off, is the essence of the new revelation which is of paramount importance to the impugned statements and their publication by the defendants. It was Tengku Razaleigh's account of his leaving the aircraft at the last moment before its take-off on the invitation of the plaintiff (which had saved the latter's life) which must have led to the first defendant's assertions about reopening of investigation 'to remove all doubts about the true causes', and opening up 'old speculation of how the plane crashed in Sembulan' (in the first statement). It was the same element in the account of Tengku Razaleigh which had also, without doubt led the defendants' assertions that 'the people will want to re-examine the June 6, 1976 air crash in light of Tengku Razaleigh Hamzah's memory of the tragedy', 'Razaleigh was trying to tell the people *something* from the past in view of the revelation *on the moment* before the Nomad aircraft took off from Labuan'.

Indeed, the first defendant himself admitted under cross-examination that 'from the new information by Tengku Razaleigh' he 'wanted the double six tragedy to be investigated'. He further agreed under cross-examination that 'the testimony and statement (in para 19(b) of the statement of defence) are made which arise as a result of Tengku Razaleigh's speech on 2 April 2010'. As such, in our view, the basic fact was the truth of Tengku Razaleigh's account as aforesaid, and not merely the making of the account by him. If in the impugned statements the defendants merely reported what Tengku Razaleigh had said in the speech, (which we reproduced at para 49 of this judgment) the plaintiff would not have cause to complain. However, as it transpired that is not the case. It is clear that not only did the first defendant adopt and embrace what Tengku Razaleigh had said in his speech, the first defendant had embellished it with speculation and insinuation of the plaintiff's possible involvement in the assassination of Tun Fuad Stephens and those on board the ill-fated Nomad, and further spicing it up by referring to assassinations of John F Kennedy, Martin Luther King and Benazir Bhutto. As such, it cannot lie in the mouth of the first defendant to say that he did not subscribe to any belief in the truth of what Tengku Razaleigh said in his speech. In such a case, it is not sufficient for the first defendant to just establish that he had verified that the statement was made. The first defendant must satisfy himself that Tengku Razaleigh's speech as well as the insinuation made in the impugned statements he published was true, and his belief in its truth must be the result of a reasonable investigation and that the belief must be a reasonable belief to hold; all of which the first defendant had failed to do.

[59] This bring us to the ten points in the test of responsible journalism enumerated in *Reynolds*. These factors are not exhaustive. The weight to be given to these points and any other relevant factors will vary from case to case. The first point is the seriousness of the allegation. The more serious the charge, the more the public is misinformed and the plaintiff harmed, if the allegation is not true. The focus is on the allegations which are not true. The insinuation of the plaintiff's possible complicity in a criminal act (of assassination of those on board the ill-fated Nomad) is very serious and capable of besmirching the plaintiff's reputation forever if what is insinuated is not true. On the second and the third points, the information was about the account by Tengku Razaleigh of his leaving the ill-fated aircraft on the invitation of the plaintiff moments before the aircraft took off, that he invited two others to leave the aircraft with him and that invitation by the plaintiff saved his and the other two persons' lives. Tengku Razaleigh did not say anything or hint about the cause of the crash. Tengku Razaleigh did not even hint let alone call for a reinvestigation into the crash. Indeed, the first defendant admitted in cross-examination that the new information did not establish the true cause of the plane crash. We have demonstrated how the first defendant had, in the impugned statements, adopted what Tengku Razaleigh had said and embellished it with speculation and defamatory insinuation. We have also explained how the truth of what

Tengku Razaleigh's speech (as opposed to the mere making of the speech) was the basic fact which led to the making of the impugned statements. This leads us to the fourth point of the steps taken to verify the information. The first defendant admitted that before he made the statement on 4 April 2010 and published it on 5 April 2010, he did not check personally with Tengku Razaleigh whether his account of the event prior to the air crash was true and accurate. In this context, it must be added that the plaintiff had, on 7 April 2010 disputed the account by Tengku Razaleigh, and challenged the first defendant to repeat his remarks. The plaintiff also gave his own version of the event. This appeared in the *Daily Express* headed 'Harris Dares Yong, Jeffrey' which was referred to and explained by the plaintiff in his evidence (at pp 607–608 of the appeal record). In that statement, the plaintiff said Tengku Razaleigh was never scheduled to fly with Tun Fuad to Kota Kinabalu on that day. According to the plaintiff, there were two planes (Nomad Aircraft) that were scheduled to take off from Labuan around the same time that ill-fated day. One of the planes was due to fly to Kudat and the passengers in the flight included Tengku Razaleigh, the plaintiff and few others. The other plane carrying Tun Fuad and other Sabah leaders was going to the state capital. Tengku Razaleigh was never scheduled to fly with Tun Fuad Stephens to Kota Kinabalu. Tengku Razaleigh together with Tun Rahman Yaakob were scheduled to fly to Kudat by plane and thereafter by helicopter to Banggi Island. The purpose of the scheduled trip to Banggi, was for Tengku Razaleigh, the then Finance Minister, to view the very first cattle farm in Sabah located on Banggi Island. Therefore, the claim that Tengku Razaleigh was pulled out of the plane by him (the plaintiff) at the last moment to board a second plane to fly to Kudat was grossly inaccurate and 'carried away with pleasantries'. In his evidence in court, the plaintiff reiterated that he was not in the same plane with the late Tun Fuad Stephens because he was supposed to accompany Tengku Razaleigh and a few others to visit a cattle farm at Pulau Banggi, Kudat by the other Nomad plane, and that it was a prearranged programme. In other words, Tengku Razaleigh was not supposed to join Tun Fuad Stephens in the first place but to join the plaintiff for a trip to Pulau Banggi, Kudat. In this regard, in cross-examination, the plaintiff said (at p 204 of the appeal record):

> Any visit by VIP a programme is prepared by State Government and the VIP himself or the Ministry because at that time Tengku Razaleigh had no ministry therefore by himself prepared 2 aircrafts in Labuan Airport. There were 2 Nomad Aircrafts in Labuan Airport. One to fly the late Tun Fuad and other people straight to Kota Kinabalu, the other aircraft to fly to Kudat. It's usual for any aircraft flying from airport to airport must have passengers' list known as manifesto. Tengku Razaleigh and myself and Tun Rahman Yaakob were scheduled a program to visit Banggi. I wish to add this statement, the statement made by Tengku Razaleigh in 1996 compared to his statement in 2010 surely YA his statement 1996 is more fresh in his mind. I do not know whether Tengku Razaleigh will be called as a witness to be asked which statement is true, the statement in the book or the statement he made on the 4.4.2010 here in Sabah. I wanted to add, surely anybody with common

A sense won't believe me to go into the aircraft where Tun Fuad, Tengku Razaleigh were already sitting in the aircraft, surely its very rude and improper for me to pull Tengku Razaleigh out of the aircraft.

B **[60]** Tengku Razaleigh's account in his speech on 2 April 2010 also differed from his previous statements on the incident as recorded in the two books which the first defendant admitted to be his reference books. In the books — 'Harris Salleh of Sabah' (at pp 534–550 of the appeal record) and 'The Sabahans — The Life and Death of Tun Fuad Stephens' (at pp 572–585 of the C appeal record) it was recorded that Tengku Razaleigh was not invited to leave the ill-fated Nomad at the last moment, which, as will be seen in a moment, was not denied by the first defendant. At p 269 of the second book it is recorded as follows:

D Improving relations with KL was another top priority. So in early June, Petronas Chairman Tengku Razaleigh Hamzah flew into Sabah. The first part of his itinerary involved a dinner in Labuan. Rahimah recollects, 'I was ill that weekend. Otherwise I would have gone to Labuan with my husband.

Tengku Razaleigh remembers that weekend vividly. In his own words:

E Donald, as I always called him in private, had hosted a personal dinner on my behalf in Labuan that Saturday night (June 5th). Donald was determined to see Sabah develop. We stayed up till 6am the next morning talking (June 6th). Then he told me he had to leave to flag off a walkathon in Kota Kinabalu, so he and his brother Ben flew back.

F I went to sleep. Some time after nine in the morning there was this loud banging on my door. When I opened it, there he was!

Donald said, 'I've just flagged off the walkathon. I couldn't just leave you here, so here I am'.

G Later we had lunch at Layang-Layang village and also addressed a large rally on the beach. After that I was schedule to fly back to KK with Donald on the same Nomad. But at the last moment, on the beach, Harris said to me, *'Why do you want to go back so early? You only need to be at the Istana in the evening. Come with me to Pulau Banggi and I'll show you a cattle ranch*'.

H *It was still quite early, so I agreed.* Because I was also Finance Minister at the time, I had a high ranking civil servant attached to me, my executive assistant, Ishak Atan, who accompanied me from KL. Ishak said that he would prefer to go back to KK first with the vesting documents to prepare for the signing ceremony after the State dinner in my honour at the Istana.

I We left Layang-Layang and headed for the airport. There were two Nomads on the runaway. *One was for Donald's contingent heading back to KK and the other was for Harris and me. But first I climbed aboard Donald's plane and looked around. I saw Rahman Ya'kub, Sarawak's Chief Minister, there already seated. I asked him, 'Why are you here? You're part of my contingent. Come with me to Pulau Banggi'. So he got out.*

I was the last person to see Donald and the others alive. Our Nomad took off after Fuad's. Then, because the flight to Kudat where we stopped to go to Pulau Banggi

was longer than Donald's flight to KK, it was only when we landed at Kudat that we were told there had been an air crash just outside KK.

[61] The relevant exchange in the cross-examination of the first defendant runs as follows:

> Put: The two books *Harris Salleh of Sabah* and *The Sabahan — The Life and Death of Tun Fuad Stephens* have put on public record the facts that Tengku Razaleigh was invited by the plaintiff at Kg Layang-Layang in the afternoon and not at the last minute at the airport while Tengku Razaleigh was also not scheduled to fly back to Kota Kinabalu with the late Tun Fuad Stephens as he had a programme to visit a cattle farm in Banggi Island, agree?
>
> A: That's what the books say.

[62] In view of all these, it behoved the first defendant to verify personally with Tengku Razaleigh the truth and accuracy of his account. However, instead of verifying the truth and accuracy of his account with Tengku Razaleigh, the first defendant published the second statement on 9 April 2010, reinforcing what he had said in the first statement.

[63] The very material difference between the plaintiff's and the first defendant's version was acknowledged by the defendants. Thus, in re-examination, the first defendant was asked: 'By the time of your second statement you already knew that there was one version of event by Tengku Razaleigh and another version by the Plaintiff. Can you clarify and explain why you didn't see fit to seek clarification from either of them?'. The first defendant answered; 'The version of events by Tengku Razaleigh vary from the version by the plaintiff and therefore I felt that this was for the tribunal to *reinvestigate* the plane crash to establish which of the two was the correct version and if the two versions can be reconciled or not. It is because of the two varying versions, that I have repeated the call for a reinvestigation in order to get the truth'. The two sentences in that answer by the first defendant contradict each other. In the first sentence, the first defendant says, because the version of events by Tengku Razaleigh differs from the version by the plaintiff, he felt that this was for the tribunal to reinvestigate the plane crash to establish which of the two was the correct version and whether the two versions can be reconciled. This cannot be true because even in the first statement on 4 April 2010 (before the plaintiff disputed Tengku Razaleigh's account and published his own version which was on 7 April 2010), the first defendant had already called for 'the investigation file' 'to be opened to remove all doubts about the true causes'. In the second sentence the first defendant says, it is because of the two differing versions that he *has repeated the call for a reinvestigation* in order to get the truth. This is also not helpful. If the two differing versions caused him to repeat the call for a reinvestigation (in the second statement), what was the cause of his call for the

investigation file to be reopened (in the first statement)? It could not have been due to the two differing versions because as we have just shown, when he published the first statement, the plaintiff had yet to publish his own version. It seems to us that the first defendant could not explain satisfactorily why he did not verify with Tengku Razaleigh or the plaintiff about the truth or accuracy of their respective versions. In any case, neither version hint, let alone mention about the cause of the crash to justify the publication of the impugned statements by the defendants.

[64] The stand of the first defendant which also reflects his attitude that it is not for him to verify the accuracy of the statement made by Tengku Razaleigh, can be seen from the following exchange in cross-examination:

> Question: Do you agree that it is one thing to verify that Tengku Razaleigh had made the statement on 2.4.2010, but it is another thing to verify with him personally the accuracy of what he had stated?
>
> Answer: I took steps to verify that Tengku Razaleigh had made that statement of 2.4.2010. What he said was very clear and reported in print. Based on that I made my comment as a matter of public interest. With due respect it is not for me to verify the accuracies of all statements made by anybody before I comment. The maker of the original statement is always free to make clarification.

[65] So, the first defendant did not verify with Tengku Razaleigh personally the truth and accuracy of his account, and Tengku Razaleigh also did not testify at the trial to establish the truth and accuracy of his account. Why this material witness for the defendants was not called to testify can be gathered from the notes of proceedings before the High Court. On 22 December 2011, before calling the first defendant to testify, from the Bar table learned counsel for the defendants informed the learned trial judge that the subpoena has been served on Tengku Razaleigh by leaving a copy of the subpoena in the latter's office. Learned counsel said at the time of service of the subpoena, Tengku Razaleigh indicated that he was not keen to come to testify. This, we pause to add, is hearsay. Learned counsel for the defendants also said that there had been many attempts to contact Tengku Razaleigh but failed. Learned counsel also informed the court that the defendants will decide at the end of the first defendant's testimony whether to enforce the subpoena by applying for a warrant of arrest against Tengku Razaleigh and that in the meantime, the defendants would like to reserve all their rights in the matter. Learned counsel for the plaintiff responded by saying to the effect that without any affidavit of service being filed in court, what was said from the Bar table by learned counsel could not be taken on its face value. Learned counsel for the plaintiff also argued that since the subpoena was left at Tengku Razaleigh's office and not served on him personally, there was no basis for saying that Tengku Razaleigh refused to testify. Learned counsel for the defendants replied to the effect that

when the defendants 'have decided to enforce the subpoena, they will produce an affidavit of service. The continued hearing then went on (at pp 439–440 of the appeal record).

[66] On 23 December 2011, at the end of the testimony of the first defendant, learned counsel for the defendants following what he told the court on 22 December 2011 informed the court that 'the defendants have made their points and established their case in this defamation trial. The defendants therefore leave it to the court whether to enforce the subpoena or not'. The thrust of learned counsel for the plaintiff's reply is that unless and until there is evidence of service filed in court, there is no basis for the court to enforce the subpoena. As to whether or not the defendants had established their case and hence not calling Tengku Razaleigh to testify, the argument submitted on behalf of the plaintiff was that the real issue which the court had to decide on the line of the defence by the defendants was the truthfulness of the statement by Tengku Razaleigh and not the existence of his statement regarding the event prior to the crash, of which submission will be made later on. For the defendants, their learned counsel responded as follows:

> We have made our points. We are the defendants in this libel suit. We think it will not be necessary to call one more witness to prove a point which has already been proven by the various witnesses for the defendants ...

In other words, the non-existence of Tengku Razaleigh's testimony in this case is not really due to the alleged refusal of Tengku Razaleigh to testify. Rather it was because the defendants themselves had decided that it was not necessary to call one more witness (which must be none other than Tengku Razaleigh) to prove their case, which according to the defendants, had been proven by the various witnesses for the defendants. This was supported by the fact that learned counsel for the defendants then informed the court that the defendants rest their case (at pp 497–500 of the appeal record).

[67] In our judgment, without Tengku Razaleigh being called to testify, the defendants have failed to establish the truth and accuracy of Tengku Razaleigh's account.

[68] Continuing with the *Reynolds*' test for responsible journalism, on the fifth point, there was already an official investigation into the crash and it was officially revealed in Parliament in 2009 by the federal government that the incident was caused by overloading, pilot error and absence of radar instrument. On the sixth, the seventh and the tenth points, there was no urgency for the first defendant to publish the first statement calling for the investigation file to be reopened to remove doubt about the true cause of the plane crash when Tengku Razaleigh's account did not even hint about the cause of the crash. Moreover, there was no urgency for the first defenant to rush into

publishing the second statement on 9 April 2010 reinforcing the first statement without verifying from Tengku Razaleigh the truth and accuracy of his account which, to the knowledge of the first defendant, was disputed by the plaintiff on 7 April 2010. Indeed, as we have shown there was no intention to verify. On the eighth point, after the publication of the first statement, on 4 April 2010, the plaintiff had, on 7 April 2010 disputed Tengku Razaleigh's account, and also gave his own version of the event. Not only did the first defendant fail to verify with the plaintiff, he published the second statement, which like the first statement, did not contain the gist of the plaintiff's version. Learned counsel for the defendants contended that as the plaintiff had put his account on the public record, there was no need for the defendants to repeat the plaintiff's version since it would be fresh in the minds of the readers of the *Daily Express*. We are unable to accept the contention. In this regard, we refer again to *Syarikat Bekalan Air Selangor*. The Court of Appeal in that case held that 'once all relevant information is in the public domain, then, the defendant is not obliged to satisfy the further *Reynolds* requirements'. In dealing with that ruling, this court said at pp 495–497:

> [41] As submitted by learned counsel for the plaintiff, a closer reading of the above passage did not support the Court of Appeal proposition of law. Clearly, the opinion in *Gatley* went further to say that parts of the *Reynolds* privilege test dealing with issues of reasonable of conduct (for example, whether steps have been taken to verify the information) were relevant. *He further argued that a far reaching implication of the Court of Appeal's proposition was that it would allow defendants to publish untrue defamatory statements, simply because the state of affairs had already been published before in the public domain. We see much force in this argument. We agree with the submissions of learned counsel for the plaintiff that this cannot be right as such a proposition runs counter to the very concept of fair and responsible journalism.*
>
> [42] There is one aspect of the decision of the High Court that deserves our attention. It is this: the High Court found that the defendant had known that the non-replacement of water pipes and mains and the cash flow problems faced by the plaintiff were the result of the freeze of capital expenditure works and the refusal of the Selangor State Government to agree to a proposed tariff hike and not the plaintiff's own fault. *The defendant deliberately withheld this information, which would have explained the plaintiff's position and indeed did nothing to elicit a response from the plaintiff*. On the contrary, the Court of Appeal held that the occasion might be privileged even if the defendant failed to disclose all the relevant facts. With respect, in so deciding, *the Court of Appeal failed to judiciously appreciate that omitting to disclose the gist of the plaintiff's side of the story would result in an unfair and misleading report and would go against the concept of responsible journalism*.
>
> [43] In his submissions, learned counsel for the plaintiff took us through the evidence of the defendant at the trial during cross-examination. *The evidence disclosed that the defendant had omitted to publish information, which he was in possession of, which would have shown the plaintiffs side of the story*, in that the non-replacement of water pipes and mains and the cash flow constraints were not due to the plaintiff's own fault. We should remind ourselves that in *Reynolds v Times Newspapers Ltd*, *Lord Nicholls held that omitting the plaintiff's explanation of the*

version of events would result in an unfair and inaccurate report, which would be misleading:

> A most telling criticism of the article is the failure to mention Mr Reynolds' own explanation to the Dáil. Mr Ruddock omitted this from the article because he rejected Mr Reynolds' version of the events and concluded that Mr Reynolds had been deliberately misleading. *It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But this cannot be a good reason for omitting, from a hard hitting article making serious allegations against a named individual, all mention of that person's own explanation*. Particularly so, when the press offices had told Mr Ruddock that Mr Reynolds was not giving interviews but would be saying all he had to say in the Dáil. His statement in the Dáil was his answer to the allegations. An article omitting all reference to this statement could not be a fair and accurate report of proceedings in the Dáil. Such an article would be misleading as a report. This article is not defended as a report, but it was misleading nonetheless. *By omitting Mr Reynolds' explanation English readers were left to suppose that, so far, Mr Reynolds had offered no explanation. Further, it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given*. An article, which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true.

> [44] In our judgment, the Court of Appeal had failed to consider that the defendant's knowledge of the plaintiff's true position and failure to disclose these facts would suggest that his conduct was unreasonable and would go against the concept of responsible journalism. In our judgment, the defendant had failed the responsible journalism test in failing to take responsible and fair steps to gather, verify and publish the impugned words.

On the ninth point, we have shown how the first defendant adopted and embraced what Tengku Razaleigh said in his speech (the truth and accuracy of which was not proven), and embellished it with speculation and insinuation of the plaintiff's possible involvement in the assassination of Tun Fuad Stephens and others who perished in the double six tragedy.

[69] In our judgment, the defendants had failed the responsible journalism test. Thus, the defendants failed to establish the *Reynolds* privilege defence. The Court of Appeal erred in finding the issue of liability in favour of the defendants and setting aside the decision of the High Court. We therefore set aside the decision of the Court of Appeal on liability.

[70] The sole ground upon which the Court of Appeal allowed the defendants' appeal was because it found that the defence of qualified privilege was not properly considered by the High Court. In fact before us the submissions by the plaintiff and the defendants centred on this issue. Our decision reversing the Court of Appeal in its finding of liability in favour of the defendants, would have brought the appeal on liability to an end. However, the

A High Court also considered the defence of fair comment which was also pleaded by the defendants, and found that the latter failed to establish it. For the sake of completeness we have also considered the finding of the High Court on that defence ourselves in the light of all the evidence before it. This is how the learned trial judge dealt with it in his judgment:

B To sustain the defence of fair comment the defendants must prove the following:

(a) the words complained of are comments;

(b) the comments are based on facts;

C (c) the comments or opinion expressed are fair; and

(d) the comments must be on matters of public interest.

The learned authors of *Gatley on Libel and Slander* defines comment as follows at p 697:

D Comment is a statement of opinion on facts. It is comment to say that a certain act which a man has done is disgraceful or dishonourable; it is an allegation of fact to say he did the act so criticized ... while a comment is usually a statement of opinion as to merits or demerits of conduct, an inference of fact may also be a comment. There are, in the cases, no clear definitions of what is comment. If the statement appears to be one of opinion or conclusion, it is capable of being E comment.

Comment to be fair must be based on facts. In *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75 *the defence of fair comment failed because the defendants failed to prove that the facts on which the comment was founded were true*. In *London Artist Ltd v Littler* [1969] 2 QBD 375 Lord Denning spoke of 'basic F facts' when he said at p 391:

In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter: see *Cunningham-Howie v Dimbleby* [1951] 1 KB 360, 364. *They are the facts on which the comments are* G *based or from which the inferences are drawn — as distinct from the comments or inferences themselves*. The commentator need not set out in his original article all the basic facts: see *Kemsley v Foot* [1952] AC 345; but he must get them right and be ready to prove them to be true.

In the context of the present case *the basic fact is Tengku Razaleigh's revelation that the* H *plaintiff asked him to leave the Nomad aircraft minutes before take off. This is the basic fact from which the insinuation of criminal conduct was drawn by the first defendant. The first defendant must get this fact right as a first step in establishing the defence of fair comment*. This is necessary because Tengku Razaleigh's version of the events was disputed by the plaintiff but which the first defendant did not believe. Was it really a last minute decision by the plaintiff and if so was there any plausible explanation I for it?

The first defendant should have verified with Tengku Razaleigh the accuracy of the new information before issuing the second statement. By not making any attempt to verify the accuracy of Tengku Razaleigh's revelation it is obvious that the first defendant had purposely abstained from enquiring into the facts or from availing

himself of means of information which lay at hand when the slightest inquiry would have shown the true situation. There is no doubt in my mind that the first defendant's intention in issuing the second statement was to tell the general public that the plaintiff's version of the events should not be believed.

In *Joshua Benjamin Jeyaretnam v Goh Chok Thong* [1989] 3 MLJ 1 the Privy Council said at p 3:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.

It behoves therefore on the defendants to call Tengku Razaleigh to clarify his statement in order to establish the defence of fair comment. In *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 Siti Norma Yaakob JCA (as she then was) said:

> He who alleges must prove such allegations and the onus is on the appellant to do so. See s 103 of the EA. Thus, it is incumbent upon the appellant to produce ... his witnesses to prove the allegation. The fact that the appellant was unable to secure the attendance of ... a witness does not shift the burden to ... produce the witness ... There is no obligation in law for the respondent to produce the witness as the obligation rests with ... the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

By failing to call Tengku Razaleigh to give evidence the consequence is that the defendants had merely proved that the revelation was made by Tengku Razaleigh but without proving the truth and accuracy of what he revealed. Since the burden is on the defendants to prove the truth and accuracy of the new information, the failure means that the burden has not been discharged.

[71] We find no reason to disturb the aforesaid findings of the High Court and we affirm it.

CONCLUSION ON LIABILITY

[72] The decision we have made thus far is sufficient to dispose of the appeal on liability. We therefore find no necessity to answer the question in respect of which the leave to appeal was granted.

[73] In the result we allow the plaintiff's appeal on liability. The decision of the High Court on liability is reinstated albeit for different reasons in respect of the finding on the defence of privilege.

A DAMAGES

[74] The plaintiff claimed RM50m in damages against the defendants. The High Court awarded a global sum of RM1m for compensatory, aggravated and general damages. The Court of Appeal held that the award was excessive and reduced it to RM100,000.

[75] For the plaintiff it was contended that the High Court's award was not excessive and ought not to be disturbed. The Court of Appeal cases of *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569, *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191 and *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris* [2014] 9 MLJ 605; [2015] 2 CLJ 557, were referred in support of that submission. In *Datuk Seri Anwar bin Ibrahim v Wan Muhammad Azri bin Wan Deris*, the High Court awarded RM800,000 to the plaintiff as general and exemplary damages. The defendant's appeal to the Court of Appeal was dismissed on 4 December 2015 (Civil Appeal No W-02(NCVC)(W)-532–03 of 2014). The defendant's application for leave to appeal was dismissed by the Federal Court on 26 July 2016 (Civil Application No 08–2–01 of 2016 (W)). For the defendants it was submitted that the Court of Appeal correctly held that the High Court's award was excessive and not supported by authorities. In support of their submission their learned counsel referred to several authorities and argued as follows:

(1) *Dato' Ahmad Rejal Arbee & Anor v Mahfuz Omar* [2015] 6 CLJ 149. This case involving defamation against politician but the Court of Appeal only granted RM110,000.

(2) *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569. The Court of Appeal only allowed an award of RM200,000 by way of global award of damages and reversed the High Court decision in granting RM1.5m previously as damages.

(3) *Dato' Musa Hitam v SH Al Attas & Ors.* [1991] 2 CLJ Rep 487. The court only grant RM100,000 as damages for defamation.

(4) *Dato' Hassan Mohamed Ali v Tengku Putra Tengku Awang & Yang Lain* [2010] 7 CLJ 856. The court only granted the sum of RM50,000 despite the fact that the plaintiff was an Exco (politician).

(5) *Chong Siew Chiang v Ng Kim Ho & Anor* [2011] 6 CLJ 62. The court held:

> ... The award of damages in libel and slander cases is normally dependent on the facts and circumstances of each case. The nature of the libel or slander, the extent of the circulation of the defamatory words and the social standing of the victim are relevant factors. Damages were awarded in the sum of RM100,000 against the first defendant and RM50,000 against the second defendant ...

(6) *Dato' Dr Tan Chee Khuan v Chin Choong Seng* [2011] 8 CLJ 574. The court only allowed the sum of RM150,000 to the plaintiff as a fair and reasonable to compensate him for the damages that he had suffered as well as to reflect that 'libel does not come cheap' in the circumstances of this case. In the present case, Datuk Harris, the respondent is a mere retiree, no longer active in politics, therefore damages, if any should be nominal.

(7) *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors (High Court decision which was affirmed by the Court of Appeal)* [2009] 2 CLJ 682. The court decided to award RM50,000 only as damages to the plaintiff against the second to fifth defendants despite the plaintiff's claim of RM43m. The plaintiff confirmed during cross-examination that his appeal against damages was recently dismissed by the Court of Appeal.

(8) *Datuk Harris Mohd Salleh v Abdul Jalil Ahmad & Anor* [1983] CLJ Rep 521. At the material time the plaintiff was still the then Chief Ministry of Sabah but the court only allowed RM100,000 in damages to the plaintiff.

(9) *Lim Guan Eng v Utusan Melayu (M) Bhd* [2012] 2 CLJ 619. The above mentioned involved a politician and also the Chief Minister of Penang. The Court observed that global damages should be awarded to ensure that awards of monetary damages are not excessive and to avoid any double counting on the damages awarded. Despite this case involving a Chief Minister a person of high ranking, the Court decided to award RM200,000 as general and aggravated damages and costs of RM25,000 only.

(10) *Dato' Seri Anwar Ibrahim v The New Straits Times Press (M) Sdn Bhd & Anor* [2010] 5 CLJ 301. The plaintiff claimed for RM100m. It was held by the court that 'the claim of RM100 million was a gross exaggeration.' A sum of RM100,000 as compensatory damages was awarded.

[76] The tort of defamation exists to protect, not the person or the pocket, but reputation of the person defamed (see *Jameel* per Baroness Hale, at p 1322). In *Chin Choon @ Chin Tee Fut v Chua Jui Meng* [2005] 3 MLJ 494; [2005] 2 CLJ 569, the Court of Appeal said at p 498 (MLJ); p 573 (CLJ):

> In *Defamation Law, Procedure & Practice* by Price & Duodu (3rd Ed, para 20-04 at p 208) the learned authors set out the several factors that a court must take into account in assessing compensatory damages. This is what they say:
>
> The amount of damages awarded in respect of vindication and injury to reputation and feelings depends on a number of factors:
>
> (1) The gravity of the allegation.
>
> (2) The size and influence of the circulation.
>
> (3) The effect of the publication.
>
> (4) The extent and nature of the claimant's reputation.
>
> (5) The behaviour of the defendant.

(6) The behaviour of the claimant.

This list is most helpful. But it must be borne in mind that this is not by any means exhaustive of the matters which the court may take into account when making an assessment.

[77] In the present appeal, the Court of Appeal gave four reasons why it held that the High Court's award was excessive. This is clear from its finding on the issue of damages which is as follows:

[24] In our judgment, even if we are wrong on the issue of liability, His Lordship's award of RM1m by way of damages is excessive on the particular facts of this case. In our view, His Lordship in awarding the sum of RM1m was influenced by His Lordship's earlier ruling that the appellant had failed to verify the truth of Tengku Razaleigh's revelations when there is no such burden since the defence relied upon was qualified privilege/fair comment and not justification. That this was an important consideration on the mind of His Lordship when determining the quantum of damages is evident by His Lordship's pronouncements in paras 1190–1195 of the judgment:

> the seriousness of the libel and the recklessness in the way it is published are relevant factors in determining the quantum of damages. In the present case the insinuation of criminal conduct was a very serious libel perpetrated on the Plaintiff. Nothing can be more humiliating than to be accused of plotting to murder a serving Chief Minster (sic) in order to usurp his position, compounded as it was by the reckless manner in which the defamatory statements were published.

[25] Secondly, His Lordship in arriving at the quantum of RM1m also placed great emphasis on the award RM3m made by Gopal Sri Ram JCA in the case of *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912. We have had occasion in the case of *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2012] 4 MLJ 191; [2012] 1 LNS 1359 to caution judges of the High Court against placing too much emphasis on this award since it was an award made during a period of unrestrained excesses on the part of the Judiciary.

[26] Thirdly, it was wrong of the learned trial judge to totally disregard the award of only RM50,000 to the respondent by way of damages by the High Court in the case of *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal & Ors* [2009] 2 CLJ 682. We opine to this effect because the respondent was similarly the plaintiff in that case and the respondent's claim was for defamation, as in the case here. Finally, with respect, since the award of damages for defamation is very much dependent on the character of the claimant, the pronouncements of the High Court judge in the case of Tan Chiaw Thong J in *Tun Mustapha v YDP Negeri Sabah & Ors* [1986] 2 MLJ 420; [1988] 2 CLJ Rep 480; [1988] 2 CLJ 330 concerning the character of the respondent is clearly a relevant factor in determining the damages to be awarded to the respondent. For this reason, in our opinion, the learned trial judge erred in commenting as follows:

> I can only think of one reason why the defendants drew the court's attention to all these cases, and that is to provide additional oomph to their allegation that the

> plaintiff is a person of questionable character. The reference to the judge's remarks in the Tun Mustapha case is wholly unnecessary and unfair to the plaintiff as he was not even a witness in that case and therefore not in a position to defend himself against those remarks, whatever the context they were made.
>
> (para 1300 at p 43 of the High Court judgment)
>
> When rejecting the submission that His Lordship should have regard to the observation of the judge in the case of Tan Chiaw Thong J in *Tun Mustapha v YDP Negeri Sabah & Ors* concerning the character of the respondent. Accordingly, in all the circumstances of this case, in our judgment, even if the learned trial judge was right on the issue of liability, the damages awarded to the respondent ought to have been RM100,000 and not RM1m.

[78] On the first reason given by the Court of Appeal, we do not think that the learned trial judge was influenced by his earlier ruling that the defendants had failed to verify the truth of Tengku Razaleigh's revelation. It appears to us from the passage in the High Court's judgment quoted by the Court of Appeal that the learned trial judge actually considered the seriousness of the libel and the recklessness in its publication, which he was entitled to in determining the quantum of damages. On the third reason we do not think that the learned trial judge totally disregarded the RM50,000 award in the case of the plaintiff against Datuk Mohd Shafie Hj Apdal. Upon due consideration the High Court found it not to be an appropriate authority because of the difference in the facts. From the answer given by the plaintiff in cross-examination in the present case, the High Court found that in the case of *Datuk Mohd Shafie Hj Apdal*, Datuk Shafie had apologised publicly to the plaintiff and in addition the former had contributed RM50,000 to Yayasan Islam. Thus, the High Court found that unlike the first defendant in the present case, Datuk Shafie Apdal regretted his action and was remorseful. On the fourth reason given by the Court of Appeal regarding certain remarks made by another High Court judge in the case of *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, concerning the character of the plaintiff, the learned trial judge in the present case opined that the reference to that remarks was unnecessary and unfair to the plaintiff as he was not even a witness in that case, and was therefore not in a position to defend himself against those remarks, whatever the context they were made. We do not think that the learned trial judge in the present case could be faulted for that.

[79] This leads us to the second reason given by the Court of Appeal — that the learned trial judge placed great emphasis on the award of RM3m made by the Court of Appeal in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* [1995] 2 MLJ 493; [1995] 2 CLJ 912.

[80] In *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385,

A the Court of Appeal observed that the decision in *MGG Pillai* was one which had been misunderstood, and that the trend set by that decision should be checked to ensure that an action for defamation would not be used as an engine of oppression. In *Liew Yew Tiam*, the Court of Appeal held, inter alia, that the learned trial judge erred when he made separate awards of damages against each
B of the appellants, and it reduced the awards totalling RM1m to RM100,000. This is what Gopal Sri Ram JCA (later FCJ), (the learned judge of the Court of Appeal who wrote the main judgment in *MGG Pillai*) said:

> In the process of making our assessment we have not overlooked the recent trend in
C this country of claims and awards in defamation cases running into several million Ringgit. No doubt that trend was set by the decision of this court in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals*. *It is a decision that has been much misunderstood*. The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think *the time has come when we should check the trend set by that case*.
D This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.
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> ...
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E We would add that we do not regard the affirmation by the Federal Court of the decision in *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & other appeals* as an insurmountable hurdle of binding precedent to our decision in the present case. For, at the end of the day, the Federal Court affirmed the award made in the circumstances of that particular case as a proper exercise of judicial discretion by the High Court upon the question of damages. We do not think that it automatically
F follows as a matter of policy that the plaintiff in every case should be entitled to receive an award in millions of Ringgit.

[81] In *Karpal Singh a/l Ram Singh v DP Vijandran* [2001] 4 MLJ 161, the
G Court of Appeal remarked that the principal governing the assessment of damages in libel cases have remained unchanged over the years. It was the amount awarded which had drastically changed over the last five or six years. Therefore, in considering the award made by the trial court, it was important to look at the trend of awards of damages made by the courts in the country. Of course, it must be borne in mind that each case was to be decided on its own
H facts and circumstances. The court then referred to awards made in several cases decided within the preceding period of twenty years from 1980. Abdul Hamid Mohamad JCA (later CJ), speaking for the Court of Appeal said:

> ... I think that the cases that I have referred are sufficient to show the trend. Until the
I arrival of Vincent Tan in 1995, the highest award ever given by the court in this country was RM100,000. *Vincent Tan sky rocketed the awards. When the award was confirmed by the Court of Appeal, what was an isolated pinnacle in an otherwise undulating plain, the trend is set*. When the Federal Court confirmed it, it became a binding precedent in all the courts in this country. But, now the Court of Appeal in *Liew Yew Tiam* has had second thoughts about it. The learned judge of the Court of

Appeal who wrote the main judgment in MGG Pillai has sought to distinguish *MGG Pillai*'s case. 'It is a decision that has been much misunderstood and the trend should be checked', he said.

This court is bound by the decisions of the Federal Court. But what is binding is the principle laid down by the Federal Court in assessing damages in libel cases, not the amount. *The amount to be awarded in each case depends on the facts and the circumstances of the case. Indeed, how much is too much, how much is too little and how much is reasonable is quite subjective. No scale can be fixed. But it does not mean that, given a set of facts, the appellate court cannot say confidently that an award is too little or too much or reasonable*. It is the same as in an appeal against sentence in a criminal case or an appeal against an award of damages in other civil cases.

The principle that this court should apply is clear: whether this court is of the view that that the trial judge had 'acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered'. (See *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato' Vincent Tan Chee Yioun & other appeals* and the cases referred to therein).

I would not say that the learned trial judge had acted on wrong principle in this case. However, I am of the view that the learned judge has misapprehended the facts and was also influenced by the prevailing trend then.

[82] In the present appeal, the learned trial judge had considered the seriousness of the libel, the extent of the publication, the plaintiff's reputation and the adverse effect of the defamatory statements on his dignity and reputation, and the conduct of the defendants including absence of remorse for defaming the plaintiff and in urging the court not to award any damages or costs to the plaintiff, all of which the learned trial judge was entitled to take into account in assessing damages. Then, there is the award in *MGG Pillai*'s case which we have to put into the scale to consider the award made by the learned trial judge. Whilst we are not prepared to share the Court of Appeal's view that the learned trial judge had placed great emphasis on the award of RM3m against the first defendant in *MGG Pillai*, it is difficult to say that if the learned trial judge had not been influenced by the award in *MGG Pillai*, he would have awarded the global sum of RM1m to the plaintiff for compensatory, aggravated and exemplary damages. This, in our view warrants appellate interference.

[83] In the circumstances of this case, we are of the view that a total award of RM600,000 would be reasonable. Therefore, the plaintiff's appeal on damages is allowed. The total damages awarded to the plaintiff is increased to RM600,000.

CONCLUSION

[84] In the result, the plaintiff's appeal is allowed with costs.

[85] Accordingly, it is ordered that:

A (a) the first and the second defendants pay to the plaintiff damages in the sum of RM600,000 with interest thereon at 8%pa from the date of the judgment of the High Court (29 February 2012) until full payment; and

(b) the first and the second defendants pay to the plaintiff costs in the sum of RM200,000 subject to the payment of allocatur.

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Appeal allowed with costs.

Reported by Kohila Nesan

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